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THE 1986 AND 1987 AFFIRMATIVE ACTION CASES: IT'S ALL OVER BUT THE SHOUTING

*Herman Schwartz**

For the moment, the affirmative action wars are over. In a ten-year set of decisions, culminating in five during the last two terms, the Court has now legitimated almost all types of race and gender preferences, even if they benefit nonvictims, including voluntarily adopted preferences in hiring, promotion, university admissions, and government contracting;¹ hiring and promotion preferences in consent decrees;² and court-ordered hiring and promotions.³ It has approved preferences by both public and private bodies, and for both racial-ethnic minorities and women. It has barred only layoffs of white (and presumably male) employees who have more seniority than employees hired under an affirmative action plan.⁴

The legitimacy of preferences for nonvictims was not, of course, the only issue left unresolved by prior decisions. For example, if race-preferential programs are permissible to remedy prior discrimination, as the earlier decisions implied, whose discrimination had to be shown? Was it enough if there had been societal discrimination, or discrimination by someone other than the person using an affirmative action program?⁵ What kind of factual showing or finding had to be made, who was competent to make it, and when would it have to be made?⁶ Would gender preferential plans be treated the same as race-preferences? Would promotional preferences be treated like hiring

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1. *United Steelworkers v. Weber*, 443 U.S. 192 (1979) (hiring); *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987) (promotion); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978) (university admissions); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (government contracts).

2. *Local 93, Intl. Assn. of Firefighters v. Cleveland*, 106 S. Ct. 3063 (1986).

3. *Local 28, Sheet Metal Workers Intl. Assn. v. EEOC*, 106 S. Ct. 3019 (1986); *United States v. Paradise*, 107 S. Ct. 1053 (1987).

4. *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

5. Compare Justice Powell's opinion in *Bakke*, 438 U.S. at 265-324, with Justice Brennan's opinion, 438 U.S. at 324-79.

6. See 438 U.S. at 265-324 (Powell, J.).

preferences or like layoffs? What other preconditions would the Court require?

Most of these questions have now been answered in a way favorable to the supporters of race- and gender-conscious action. Only peripheral issues remain, and even some of these may have been implicitly resolved.

The 1986-1987 decisions were surprising. Just three years ago, *Firefighters Local Union 1784 v. Stotts*⁷ seemed to presage the demise of almost all race-conscious programs. In seemingly unequivocal language, the Court read Title VII to allow relief "only to those who have been actual victims of illegal discrimination."⁸ The 1986 decisions, however, relegated *Stotts* to a special situation — layoffs in a modification of a consent decree. And this past term, the opponents' last hopes were dashed as the Court upheld a hiring and promotion plan for women adopted by the Santa Clara Transportation Department in an opinion for a five-member majority that seemed designed to end most disputes. Despite the inevitable loose ends, some of which are both troublesome and unnecessary, the Court validated most of the many voluntary affirmative plans currently in force.

Perhaps the result should not have been entirely unexpected, for there were precedents enough.⁹ And the disruption that a contrary ruling would have caused would give any court pause, for there are literally hundreds of thousands of such plans,¹⁰ covering many millions of workers. Moreover, outside the Reagan administration affirmative action is now widely accepted. One of the astonishing aspects of the controversy is how much opposition developed to the administration's effort to kill affirmative action, particularly among the business community.¹¹

7. 467 U.S. 561 (1984). The specific substantive issue in *Stotts* was whether senior nonminority employees could be laid off to preserve increases in minority employment.

8. 467 U.S. at 580. Solicitor General Rex E. Lee called *Stotts* a "slam dunk" of a decision. See Barbash, *High Court Rules for Seniority, Not Affirmative Action*, Wash. Post, June 13, 1984, at A1, col. 5.

9. See, e.g., *Bakke*, 438 U.S. at 265; *Fullilove*, 448 U.S. at 448; *Weber*, 443 U.S. at 193.

10. Bandow, *A Do-It-Yourself Agenda for President Reagan*, 8 CATO POLY. REP., Nov.-Dec. 1986, at 1, 10.

11. See, e.g., *Affirmative Action: Joint Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary and Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 207 (1985) [hereinafter *Hearings*] (testimony of William McEwen, National Association of Manufacturers). The strength of affirmative action is also reflected in the inability of one of the most popular presidents in history to rewrite E.O. 11246 (requiring affirmative action by government contractors), which he could do by a stroke of his pen, as well as in the almost uniformly negative response to Assistant Attorney General William Bradford Reynolds by 51 jurisdictions when he urged them to use *Stotts* as a basis for abandoning their affirmative action plans. *Affirmative Action Revisions Revisited*, Wash. Post, Apr. 3, 1985, at A1, col. 1. Of 21 "top papers" in the country that

Perhaps most significant is that in *Johnson v. Transportation Agency*,¹² the most sweeping and definitive of the Court's affirmative action opinions, the Court issued a majority opinion for five Justices, one of the few times it has done so in a decision upholding affirmative action,¹³ and the opinion was by Justice William Brennan, who is the most frequent spokesman for the Justices favoring affirmative action.¹⁴ And Justice Lewis F. Powell signed on to the Brennan opinion without adding anything separately, which he rarely did even when joining a majority. Powell was the only Justice who had been on the winning side in every single affirmative action case in which he participated,¹⁵ and he almost always had been either the plurality's spokesperson, or the swing opinion.

Johnson was not a 5-4 decision, however, but 6-3, for Justice Sandra Day O'Connor concurred separately, and her opinion, despite her expressions of misgiving about the outcome, may prove the most important. Whereas the majority chose to decide the case only on statutory and not on constitutional grounds, she dealt with both in a way that probably validates voluntary public plans as well.

Three Justices dissented, with the lead dissent an outraged *cri de coeur* by freshman Antonin Scalia. In what was basically an attack on the majority for following *United Steelworkers v. Weber*,¹⁶ Justice Scalia signaled a readiness to overrule that case. Despite six votes on the other side (now five with Justice Powell's resignation), this raises some clouds on the future of affirmative action. There almost certainly will be some new Justices in the next few years in addition to Justice Anthony M. Kennedy, and if they share Justice Scalia's hostility toward affirmative action and disdain for precedent, then these decisions may not last very long.

commented on the 1986 cases, only one opposed the use of affirmative action to remedy discrimination, and 17 praised the decisions without any qualifications. ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, BIG 50 PRESS SURVEY: U.S. SUPREME COURT "AFFIRMATIVE ACTION" RULINGS — PREFERENTIAL HIRING OF MINORITIES 2 (Sept. 10, 1986). The 1987 decisions were also enthusiastically received by the business community. See N.Y. Times, Mar. 29, 1987, § 4, at 1, col. 4 (quoting Stephen Boskat, vice-president and general counsel, United States Chamber of Commerce).

12. 107 S. Ct. 1442 (1987).

13. *Weber*, 443 U.S. at 193, was the first and *Firefighters*, 106 S. Ct. at 3063, the second.

14. The other two are Justices Thurgood Marshall and Harry Blackmun.

15. Justice Powell recused himself in *Weber*, as did Justice John Paul Stevens.

16. 443 U.S. 193 (1979). *Weber* held that "Title VII does not prohibit . . . race-conscious affirmative action [hiring] plans." 443 U.S. at 197.

I. THE CASES

Wygant v. Jackson Board of Education¹⁷

Jackson, Michigan hired its first black schoolteacher in the 1953-1954 school year. By 1968-1969, when black students made up 15.2% of the student body, black teachers accounted for only 3.9% of the teaching staff. In 1969, the Jackson NAACP filed a complaint with the Michigan Civil Rights Commission charging student segregation and discriminatory hiring and assignment.¹⁸ The Commission's investigation concluded that "each of the allegations . . . can be substantiated,"¹⁹ and the Jackson School Board took steps to desegregate its schools. Recruitment efforts were made, but when layoffs became necessary in 1971, they were made in order of seniority, and many newly hired minority teachers were laid off. This "literally wip[ed] out all the gain,"²⁰ according to the school superintendent.

In February 1972, racial tensions in the school system exploded. A new contract was adopted which provided that the goal of minority hiring "shall be to have at least the same percentage of minority racial representation on each individual staff as is represented by the student population of the Jackson Public Schools," and that should layoffs become necessary, "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."²¹

When layoffs became necessary again in April 1974, the board ignored the contract and followed seniority. After litigation in both federal and state courts, the layoff provision was upheld, though neither the federal nor the state court found that the board had discriminated against minorities in its hiring practices.²² When layoffs were again made, they were in accordance with the 1972 contract. Laid-off white teachers sued, claiming a denial of equal protection.²³

Both sides moved for summary judgment. Though noting that "[i]n both *Weber* and [*Detroit Police Officers Association v. Young* [608 F.2d 671 (6th Cir. 1979)] it was appropriate, when searching for evidence of past discrimination, to compare the percentage of blacks in

17. 106 S. Ct. 1842 (1986).

18. Brief for Respondents at 3-4, *Wygant* (No. 85-1340).

19. 106 S. Ct. at 1859 n.2 (Marshall, J., dissenting).

20. 106 S. Ct. at 1859.

21. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1198 (E.D. Mich. 1982) (quoting Jackson teachers' contract, art. VII D.1 and art. XII B.1).

22. *Wygant*, 106 S. Ct. at 1845 (Powell, J.).

23. Other grounds not pertinent here were also raised. See *Wygant*, 546 F. Supp. at 1199.

the employer's work force with the percentage of blacks in the relevant labor pool," the district judge decided that:

in the setting of this case, it is appropriate to compare the percentage of minority teachers to the percentage of minority students in the student body, rather than with the percentage of minorities in the relevant labor market. . . . [M]inority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models.²⁴

And he granted summary judgment for the defendant on this ground. No comparison between the proportion of blacks in the work force and in the relevant labor pool was made.

The court of appeals relied almost entirely on the district court's opinion, but also noted the existence of historic discrimination and observed that the agreement was "designed to remedy past obvious race discrimination . . . and racial tensions engendered by that history."²⁵

The Supreme Court reversed, though no majority was mustered for any one opinion. A plurality opinion by Justice Powell for himself, Chief Justice Warren E. Burger and Justice William H. Rehnquist, joined in part by Justice O'Connor, first rejected societal discrimination, and particularly the role-model theory, as a predicate for the race-preferential affirmative action plan approved by the lower courts. The board's argument that it could prove prior discrimination was dismissed with the comment that the argument was not only belated, it was also irrelevant because the layoff provision would be invalid in any case.²⁶

Justice Powell went on to reaffirm his earlier expressed view that strict scrutiny must be given to all racial classifications in lieu of the lower court's apparent use of a "reasonableness" standard: "We have recognized," he acknowledged, "that in order to remedy the effects of prior discrimination it may be necessary to take race into account."²⁷ But, he went on to say, "the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes — such as the adoption of hiring goals — are available."²⁸

In her concurrence, Justice O'Connor agreed with Justice Powell that strict scrutiny was appropriate, but also noted that there were governmental interests not mentioned by Powell or considered by the

24. 546 F. Supp. at 1201.

25. *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152, 1159 (6th Cir. 1984).

26. *Wygant*, 106 S. Ct. at 1849.

27. 106 S. Ct. at 1850.

28. 106 S. Ct. at 1852 (footnote omitted).

Court that might be found "sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." She also observed that "the Court has forged a degree of unanimity . . . that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor."²⁹

Justice O'Connor concurred as well in Justice Powell's rejection of societal discrimination as an acceptable predicate for a remedy. This led her also to reject Jackson's plan, but on two grounds that seem different from Powell's: first, because the lower courts had applied a reasonableness standard instead of strict scrutiny, and second, because the layoff provision was keyed to a "hiring goal [parity with minority student representation] that itself has no relation to the remedying of employment discrimination."³⁰ Unlike Justice Powell, she apparently reserved the question of whether layoffs were ever acceptable, saying she did not think it necessary to decide whether this or "any layoff provision could survive strict scrutiny."³¹

Justice White concurred separately on the ground that he could never accept racially motivated layoffs as a way to integrate a work force.³²

There were two dissenting opinions. In an opinion for himself and Justices Brennan and Blackmun, Justice Marshall stressed that the plan represented a voluntary and bargained-for compromise to divide the burden of layoffs. He noted that the goal of easing Jackson's racial tensions would justify the plan, regardless of whether "societal discrimination" was an acceptable target, and he argued that the Court should have remanded for a trial on this issue. As to whether this layoff provision was an appropriate "means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged,"³³ Justice Marshall insisted that it was absolutely necessary to protect minority teachers against layoffs if the recruiting efforts were to have any success, because teachers from other states would not "uproot their lives and move to Michigan" otherwise.³⁴ Further, he noted how often "[t]he general practice of basing employment decisions on

29. 106 S. Ct. at 1853 (O'Connor, J., concurring).

30. 106 S. Ct. at 1857.

31. 106 S. Ct. at 1857.

32. 106 S. Ct. at 1857 (White, J., concurring).

33. 106 S. Ct. at 1860 (Marshall, J., dissenting).

34. 106 S. Ct. at 1864.

relative seniority may be upset for the sake of other public policies.”³⁵

Justice Stevens dissented separately. He would have upheld the plan not on any theory of past discrimination but because “a school board may reasonably conclude that an integrated faculty” would have educational benefits.³⁶ This was not a plan that excluded anyone, but rather was designed to include more minority faculty. “The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle.”³⁷ The collective bargaining procedures used to adopt the plan were fair, and the harm to the nonminorities was

not based on any lack of respect for their race, or on blind habit and stereotype. Rather, petitioners have been laid off for a combination of two reasons: the economic conditions that have led Jackson to lay off some teachers, and the special contractual protections intended to preserve the newly integrated character of the faculty in the Jackson schools. Thus, the same harm might occur if a number of gifted young teachers had been given special contractual protection because their specialties were in short supply and if the Jackson Board of Education faced a fiscal need for layoffs.³⁸

Local 28, Sheet Metal Workers v. EEOC³⁹

In 1964, the New York State Commission for Human Rights found that Local 28 had excluded blacks from union membership and from the union’s apprenticeship program, in violation of state law. Local 28 defied the Commission’s orders to comply with the law, and the Commission obtained a state court order. This, too, proved ineffectual and in 1971 the United States sued the union under Title VII. In 1975, the federal district court found intentional exclusion of blacks, discrimination, and bad faith. It ordered a 29% nonwhite membership goal, and an apprenticeship program with “a white-non-white ratio to be negotiated by the parties.”⁴⁰ An administrator was appointed and after the plan was modified on appeal, the union was given more time for compliance.

In 1982, the plaintiffs moved that the union be held in contempt for violating the order. The court found that petitioners had defied the order “almost from its date of entry,”⁴¹ and imposed a \$150,000 fine

35. 106 S. Ct. at 1864.

36. 106 S. Ct. at 1868 (Stevens, J., dissenting).

37. 106 S. Ct. at 1869.

38. 106 S. Ct. at 1870.

39. 106 S. Ct. 3019 (1986).

40. 106 S. Ct. at 3027-28.

41. 106 S. Ct. at 3029 (quoting Appendix to Petition for Certiorari at A-156).

to be placed in a special fund to increase nonwhite membership in the union and the apprenticeship program.

A year later, the union was again held in contempt for disobeying the order. The district court established a 29.23% minority membership goal to be met by August 31, 1987. With some modifications, the court of appeals affirmed, distinguishing *Stotts*. The union, supported by the Solicitor General, appealed to the Supreme Court, maintaining that the membership goal and fund violated Title VII because they gave race-conscious preferences to nonvictims.⁴²

In an opinion for himself and Justices Marshall, Blackmun and Stevens,⁴³ Justice Brennan rejected the Solicitor General and the union's contention as inconsistent with the statutory language, purpose, and legislative history, and with prior decisions. The plurality distinguished *Stotts*,⁴⁴ arguing that that case had simply denied make-whole relief such as competitive seniority, back-pay, or promotion, to nonvictims, and was not intended to prevent a court from ordering other forms of race-conscious relief for nonvictims.⁴⁵

While cautioning that race-preferential relief should not be resorted to routinely, Justice Brennan found the decree against Local 28 to be necessary because of the union's "long continued and egregious racial discrimination" and "foot-dragging resistance";⁴⁶ also, the decree was flexible, temporary, and would not "unnecessarily trammel the interests of white employees."⁴⁷ For virtually the same reasons, the district court's order did not violate the equal protection component of the fifth amendment.

Citing his plurality opinion (which was joined by Justices Marshall, Blackmun, and Stevens), Justice Powell's concurrence, and Justice White's dissent, Justice Brennan summarized that "six members of the Court agree that a district court may, in appropriate circumstances, order preferential relief benefitting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII."⁴⁸

Justice Powell concurred, focusing on the constitutional issue. After asserting that strict scrutiny must be applied, he generally accepted Justice Brennan's conclusions as to alternatives, duration, flexibility,

42. 106 S. Ct. at 3030-31.

43. Justice Brennan wrote for the Court on other issues not relevant here.

44. 467 U.S. 561 (1984).

45. *Sheet Metal Workers*, 106 S. Ct. at 3048-50 (plurality opinion) (Brennan, J.).

46. 106 S. Ct. at 3051.

47. 106 S. Ct. at 3052 (quoting *Weber*, 443 U.S. at 208).

48. 106 S. Ct. at 3054.

size of the goal, and harm to nonminorities.⁴⁹

Justice O'Connor dissented, because she thought the lower court had insisted on the August 31, 1987 deadline "without regard to variables such as the number of qualified minority applicants available or the number of new apprentices needed,"⁵⁰ thereby turning the goal into a quota. Justice White shared this view, though he also stated his general agreement with the rest of the Brennan opinion.⁵¹ In passing, Justice O'Connor criticized the plurality's reading of the statute and its legislative history.⁵²

Justice Rehnquist and Chief Justice Burger dissented briefly, relying on their much lengthier dissent in *Firefighters v. Cleveland*,⁵³ which argued that section 706(g) of Title VII,⁵⁴ as interpreted in *Stotts*, precluded any race-conscious relief for nonvictims.

Local 93, International Association of Firefighters
v. City of Cleveland⁵⁵

This case turned out to be the least controversial decision, for it was the most limited.

The Vanguard, an association of black and Hispanic firefighters, entered into a consent decree with the City of Cleveland setting aside a certain number of promotional opportunities for minorities; the union objected. For a six-member majority, Justice Brennan read section 706(g) as a limitation solely on court orders and not on consent decrees, which were held not to be "orders" within the meaning of the statute, but voluntary agreements. He avoided ruling on what limitations section 706(g) might impose, while acknowledging that such agreements were still subject to the prohibitory provisions of section

49. 106 S. Ct. at 3054-57 (Powell, J., concurring).

50. 106 S. Ct. at 3061 (O'Connor, J., dissenting).

51. 106 S. Ct. at 3062 (White, J., dissenting).

52. 106 S. Ct. at 3058-59 (O'Connor, J., dissenting).

53. 106 S. Ct. at 3082.

54. Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1982), sets out the courts' remedial powers. In pertinent part, it provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of . . . this title.

55. 106 S. Ct. 3063 (1986).

703 of Title VII⁵⁶ and, for public agencies, subject to the fourteenth amendment. *Stotts's* reach was again limited, this time to cases involving a court-ordered modification of consent decrees.⁵⁷

Justice White dissented on the ground that insofar as the consent decree gave minorities preference over whites with respect to promotions, this displaced whites as much as did layoffs.⁵⁸ The dissent by Justice Rehnquist, which Chief Justice Burger joined, accepted the Solicitor General's argument that *Stotts* and the legislative history dictated that consent decrees were "orders" under section 706(g), and that only specific identified victims of discrimination were entitled to relief under the statute.⁵⁹

United States v. Paradise⁶⁰

This seemed the easiest case of all, but was only a 5-4 decision and, as in so many of these cases, there was no opinion for the Court, the lead opinion mustering only four votes.

For thirty-seven years, the Alabama State Police had not hired a single black trooper. In 1972, Judge Frank Johnson imposed a hiring order, but by 1979 there were still no blacks at any upper level of the Department. Four years later, after two consent decrees and several unfulfilled promises by the Department to develop an acceptable promotional procedure, the Court ordered that "for a period of time," at least 50% of future promotions to corporal must be black "if there were qualified black candidates [and] if the rank were less than 25% black," until the Department developed and implemented a valid promotion plan.⁶¹ The Department then promoted eight blacks and eight whites to corporal, and submitted an acceptable promotion plan, at which time the 50-50 order was suspended.⁶²

Although the United States was the original plaintiff in the case, it opposed the 50-50 promotional requirement on equal protection grounds. It lost. A plurality opinion by Justice Brennan, for himself

56. Section 703, 42 U.S.C. § 2002e-2, details Title VII's prohibitions against discrimination because of race, color, religion, sex, or national origin.

57. 106 S. Ct. at 3079. *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984), invalidated a district court order enjoining the City of Memphis from following its seniority system during firefighters layoffs. It specifically rejected the Union's argument that the injunction was either an enforcement or a modification of a consent decree entered into by the City and the Union to remedy past discriminatory hiring and promotional practices. 467 U.S. at 573-83.

58. 106 S. Ct. at 3081-82 (White, J., dissenting).

59. 106 S. Ct. at 3085-87 (Rehnquist, J., dissenting).

60. 107 S. Ct. 1053 (1987).

61. 107 S. Ct. at 1062-63 (emphasis in original).

62. 107 S. Ct. at 1063-64.

and Justices Marshall, Blackmun, and Powell, stressed that the plan was sufficiently narrowly tailored to meet the strictest scrutiny. The plurality found the plan was an interim procedure necessitated by the Department's recalcitrance in presenting a valid promotional plan and its need for fifteen more corporals. Alternatives were either never proposed to the district court or were inadequate. In any event, the plurality noted, it was important to "acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. . . . [The Court has not] 'required remedial plans to be limited to the least restrictive means of implementation.'"⁶³

Justice Stevens, concurring separately, would have gone even further. Citing *Swann v. Charlotte-Mecklenburg Board of Education*,⁶⁴ he insisted that since an egregious violation had been proven, "the District Court had broad and flexible authority to remedy the wrongs resulting from this violation — exactly the opposite of the Solicitor General's unprecedented suggestion that the judge's discretion is constricted by a 'narrowly tailored to achieve a compelling governmental interest' standard."⁶⁵

The dissenters also focused on the issue of alternatives. Justice O'Connor wrote for herself, the Chief Justice, and Justice Scalia, and insisted that the district court's 50-50 order was not "manifestly necessary" because other methods were available and the district court had failed to "expressly evaluate the available alternative remedies."⁶⁶ "[T]o survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy," she argued, but in this case "[t]he District Court had available several [less burdensome] alternatives."⁶⁷

As usual in these cases, Justice White was enigmatically negative. He dissented separately in two terse sentences saying he agreed with "much of what Justice O'Connor ha[d] written" (without saying how much) and thought it "evident that the District Court exceeded its equitable powers."⁶⁸

63. 107 S. Ct. at 1073 (quoting *Fullilove*, 448 U.S. at 508).

64. 402 U.S. 1 (1971).

65. *Paradise*, 107 S. Ct. at 1077 (Stevens, J., concurring).

66. 107 S. Ct. at 1080, 1082 (O'Connor, J., dissenting).

67. 107 S. Ct. at 1082.

68. 107 S. Ct. at 1080.

Johnson v. Transportation Agency⁶⁹

In December 1978, the Santa Clara District Board of Supervisors unilaterally adopted an affirmative action plan pursuant to which the Transportation Agency agreed to consider sex as a factor in promoting within traditionally segregated job classifications where women were substantially underrepresented in proportion to their representation in the county labor force. In the Skilled Craft Worker category, which covered "[o]ccupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs,"⁷⁰ none of the 238 positions were held by women. The plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications."⁷¹ The official reason for adopting the plan was that "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."⁷²

On December 12, 1979, the agency announced a vacancy for the promotional position of road dispatcher, which falls into the "Skilled Craft Worker" category. Twelve employees applied, including Diane Joyce and Paul Johnson. Each was experienced and had earlier applied for the road dispatcher position in 1974, but each had been turned down for lack of experience.

Nine applicants, including Joyce and Johnson, passed the first screen and were then interviewed by a two-person board. Johnson tied for second at 75 and Joyce was next with 72.5, rounded to 73. Only Joyce and Johnson were rated "well-qualified," with no negatives; the top candidate lacked clerical experience.⁷³ The seven top candidates then went before a three-man board of supervisors who unanimously recommended Johnson.

Joyce was apprehensive of possible prejudice against her because she had experienced difficulties with two of the three men on the final

69. 107 S. Ct. 1442 (1987).

70. 107 S. Ct. at 1453 n.12.

71. 107 S. Ct. at 1446 (quoting Joint Appendix at 31).

72. 107 S. Ct. at 1446 (quoting Joint Appendix at 57).

73. Joint Appendix at 27-28, *Johnson* (No. 85-1129).

panel: one of them had earlier described her as a "rebel-rousing skirt-wearing person,"⁷⁴ and another had apparently treated her unfairly compared to male workers, which the trial court described as conduct that "may be indicative of discriminatory intent on the part of [panel member] Mr. Baldanzi."⁷⁵ Joyce therefore contacted the affirmative action officer who recommended to the agency director that Joyce get the promotion. After some deliberation, the extent of which was disputed, the director chose Joyce. He explained that he had "tried to look at the whole picture," including affirmative action.⁷⁶

After complaining to the Equal Employment Opportunities Commission and receiving a right-to-sue-letter, Johnson sued under Title VII and won. He raised no constitutional issues. The district court found Johnson was more qualified, and that Joyce's sex was the "determining factor" in the promotion. It concluded that the plan was not sufficiently temporary as *Weber*⁷⁷ required, but was "a *permanent* part of the agency's operating philosophy."⁷⁸

The Ninth Circuit overturned the district court's ruling, finding that the plan was intended only to *attain*, not to maintain a balance, and that the absence of a termination date was not dispositive; the other *Weber* criteria were also met. The court added that the statistics of underrepresentation — no women out of 238 employees — established a *prima facie* case of discrimination against women in the Skilled Craft Worker category.⁷⁹

The Supreme Court affirmed. In an opinion for a five-member majority, Justice Brennan upheld the plan under *Weber*, refusing to apply the *Wygant* criteria⁸⁰ because the prohibitory scope of Title VII "was not intended to extend as far as that of the Constitution."⁸¹ The agency's plan was acceptable because it was designed to correct a "manifest imbalance" in "traditionally segregated job categories"; the agency did not have to prove a *prima facie* case of its own discrimination or even an "arguable violation" of the law. The program was temporary because it was designed to attain, not maintain, a balanced work force. It was flexible, because the agency had quickly recognized it could not meet its ultimate goals and had revised them downward,

74. *Johnson*, 107 S. Ct. at 1448 n.5.

75. Appendix to Petition for Certiorari at 9a, *Johnson*.

76. 107 S. Ct. at 1464-65 (O'Connor, J., concurring).

77. *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

78. Appendix to Petition for Certiorari at 7a, *Johnson* (emphasis in original).

79. 770 F.2d 752, 758 n.5 (9th Cir. 1985), *aff'd.*, 107 S. Ct. 1442 (1987).

80. See text at notes 26-29 *supra*.

81. *Johnson*, 107 S. Ct. at 1449-50 n.6.

and the plan did not operate according to strict numbers but on an individual basis. Finally, the plan did not unnecessarily trammel the interests of male employees because it involved neither a discharge nor an absolute bar to males' advancement.

Justice Stevens concurred, while joining in the majority opinion, to stress that Title VII did not preclude preferences for other reasons besides remedying prior discrimination, such as improving services to ethnic constituencies, defusing racial tension, or increasing the diversity of a work force.⁸²

Justice O'Connor concurred separately to insist on compliance with *Wygant*.⁸³ To her, Title VII and the fourteenth amendment's equal protection clause imposed identical standards. Therefore, before an employer could voluntarily give racial or gender preferences, there had to be a firm basis for believing that the anti-discrimination law had been violated. This, in turn, required the plaintiff to produce sufficient evidence for a prima facie case under Title VII — a standard explicitly rejected by the majority. Applying the constitutional standards to this case, she concluded that a prima facie case of discrimination had indeed been made, since none of the 238 Skilled Craft Workers were women.

Justice Scalia, for himself and the Chief Justice, wrote an angry dissent,⁸⁴ attacking the majority for not adopting the *Wygant* standard, for ignoring what he saw as the limitations of *Sheet Metal Workers*,⁸⁵ and indeed, for not overruling *Weber*, which he considered wrongly decided both as to the legislatively intended meaning of Title VII, and sound policy. He called instead for a virtual repudiation of all preferences. Justice White joined in part of the Scalia dissent, including the call for overruling *Weber*. White thought *Weber* had involved "intentional and systematic exclusion of blacks by the employer and the unions from certain job categories," but since "[t]he Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force," he viewed *Weber* and *Johnson* as "a perversion of Title VII."⁸⁶

82. 107 S. Ct. at 1460 (Stevens, J., concurring).

83. 107 S. Ct. at 1460 (O'Connor, J., concurring).

84. 107 S. Ct. at 1465 (Scalia, J., dissenting).

85. 106 S. Ct. 3019 (1986); see text at note 112 *infra*.

86. 107 S. Ct. at 1465 (White, J., dissenting).

II. THE PUBLIC-PRIVATE DISTINCTION

The central issues after *Stotts* were *whether* any race- or gender-conscious affirmative action is legal and constitutional, and if so, *when*? The first 1986 decision, *Wygant v. Jackson Board of Education*,⁸⁷ answered the “whether” question affirmatively and decisively. As Justice O’Connor put it, “the Court has forged a degree of unanimity . . . that [an affirmative action] plan need not be limited to the remedying of specific instances of identified discrimination.”⁸⁸

Wygant and the remaining decisions fleshed out the “when.” Somewhat oversimplified, the governing rules seem to be these:

For a race- or gender-conscious affirmative action plan not involving layoffs to pass *constitutional* muster, it probably⁸⁹ will be subjected to strict scrutiny, so that the plan must further a compelling state purpose and be narrowly tailored. Remedying the effects of prior discrimination is at least one acceptable purpose, and to be narrowly tailored, a plan must be temporary, flexible, and necessary; the number of minorities or women to be favored must be proportionate to a relevant qualified pool; and the interests of nonminority or male workers should not be unduly burdened. These rules seem applicable to both voluntary⁹⁰ and court-ordered⁹¹ public-agency plans.

An affirmative action plan affecting employment can be ordered by a court without running afoul of *Title VII* if such a remedy is necessary in order to remedy “persistent or egregious discrimination,” to “dissipate the lingering effects of pervasive discrimination,” and perhaps in “other circumstances.” It must be flexible and temporary and may not “unnecessarily trammel the interests of white employees.”⁹² An employer may *voluntarily* adopt such a plan, if it is designed to “eliminate manifest racial [or gender] imbalances in traditionally segregated job categories,” does not “unnecessarily trammel the interests of . . . white [or male] employees” or create an “absolute bar” to their advancement,⁹³ and is “intended to *attain* a balanced work force,” not “to maintain a permanent racial and sexual balance.”⁹⁴

Although there may be some slight theoretical differences between

87. 106 S. Ct. 1842 (1986); see text at notes 17-38 *supra*.

88. 106 S. Ct. at 1853.

89. The reasons for the “probably” will be discussed in the text at notes 125-63 *infra*.

90. See *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant*, 106 S. Ct. 1842 (1986).

91. See *Sheet Metal Workers*, 106 S. Ct. 3019 (1986); *Paradise*, 107 S. Ct. 1053 (1987).

92. *Sheet Metal Workers*, 106 S. Ct. at 3050-52 (citing *Weber*, 443 U.S. at 208).

93. *Johnson*, 107 S. Ct. at 1450-51 (quoting *Weber*, 443 U.S. at 197).

94. *Johnson*, 107 S. Ct. at 1456 (emphasis in original).

Title VII requirements for court-ordered plans and the constitutional requirements for both court-ordered and voluntary plans, the major difference seems to be between what Title VII permits for voluntary plans, on the one hand, and the largely similar but apparently more stringent requirements for the other three types.⁹⁵ If the constitutional

95. Regardless of the wisdom of the public-private distinction discussed in the text below, see text at notes 96-105 *infra*, there seemed to be a solid six-member majority (until Justice Powell's resignation) for following *Weber* and allowing a private employer voluntarily to adopt race- or gender-preferential plans under less stringent requirements than are required for a court order. There are indications that Justice Anthony M. Kennedy, Justice Powell's successor, also approves of *Weber* and *Johnson*. See note 105 *infra*. Only Justice Scalia and Chief Justice Rehnquist, who dissented in *Weber*, explicitly reject the voluntary-involuntary distinction even when the discrimination in question is by private employers. 107 S. Ct. at 1470 (Scalia, J., dissenting) ("There is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination."). Justice White's views on this issue are unclear.

Justice Scalia's attack is actually on race- or gender-conscious affirmative action itself. Not only does he call for overruling *Weber* on the basis of the Rehnquist dissent in that case, but his reference to affirmative action as "intentional discrimination on the basis of race or sex" confirms the hostility toward any kind of race- or gender-conscious affirmative action that he showed before he joined the bench. 107 S. Ct. 1472 (Scalia, J., dissenting). See also Scalia, *The Disease As Cure*, 1979 WASH. U. L.Q. 147, 156 ("I am, in short, opposed to racial affirmative action for reasons of both principle and practicality. Sex-based affirmative action . . . seems to me an equally poor idea . . ."). This is also shown by his passing criticism of *Bakke* in his *Johnson* dissent. 107 S. Ct. at 1474.

Weber has been fully discussed in the literature. See, e.g., Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); Cox, *The Question of "Voluntary" Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981); Blumrosen, *Affirmative Action in Employment after Weber*, 34 RUTGERS L. REV. 1 (1981). It may, however, be worth responding to those of Justice Scalia's points that reflect developments since *Weber* was decided:

(1) Justice Scalia claims that subsequent congressional silence implies nothing about whether the *Weber* Court rightly read the intent of the 1964 Congress that enacted Title VII, calling the silence argument a "canard." 107 S. Ct. at 1473 (Scalia, J., dissenting). That normally would be true, but *Johnson* involved the 1972 Act, and there are strong indications that the Congress that brought state and local agencies under Title VII was fully aware of Executive Order 11246 requiring federal contractors to adopt quota relief, and the many decisions almost uniformly authorizing such a remedy. See the legislative history discussion in *Sheet Metal Workers* by Justice Brennan, 106 S. Ct. at 3045-47. Indeed, Congress explicitly rejected Senator Ervin's amendment to overturn the affirmative action requirements of Executive Order 11246. SENATE SUBCOMM. ON LABOR OF COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL OPPORTUNITY ACT OF 1972 1017, 1042, 1074 (Comm. Print 1972) [hereinafter LEGISLATIVE HISTORY]. Moreover, the decision to bring state and local governments under Title VII was stimulated largely by a 1969 Civil Rights Commission Report, see H.R. REP. NO. 238, 92d Cong., 1st Sess. (1971), reprinted in LEGISLATIVE HISTORY, *supra*, at 78-80; S. REP. NO. 415, 92d Cong., 1st Sess. (1971), reprinted in LEGISLATIVE HISTORY, *supra*, at 419; LEGISLATIVE HISTORY, *supra*, at 1114-17 (debate), which called for goals to "giv[e] the work force the shape it presently would have were it not for such past discrimination . . . to be achieved within a specified period of time." *Id.* at 1120. See also *id.* at 197-98, 1167-68, 1173. The Civil Rights Commission report also urged that higher test performance by nonminorities should not govern selection if "competing minority applicants, especially if they have waiting list seniority, are qualified to do the job." *Id.* at 1121. See also the report on hiring Mexican-Americans for state and local law enforcement, inserted into the *Congressional Record* during the debate, *id.* at 1136-37, which incorporates the pertinent sections of the above-mentioned 1969 Civil Rights Commission Report.

(2) Justice Scalia denigrates the values of stability and stare decisis, saying that *Weber* itself created instability. 107 S. Ct. at 1473-74 (Scalia, J., dissenting). Conversations with Title VII

standards for voluntary plans are significantly more stringent than the statutory requirements, affirmative action hiring and promotion plans by many public agencies remain under a constitutional cloud.⁹⁶

At least five members of the Court seemed to believe that the constitutional requirements for public plans should indeed be more stringent, for both race- and gender-conscious plans. In *Johnson*, Justice Brennan, writing for the Court, rejected the views of the dissenters and Justice O'Connor that "the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, . . . [and] therefore, should be governed by *Wygant*." Dismissing an argu-

lawyers and others indicate no such instability; indeed, overruling *Weber* would create enormous disruption, which is one reason why employers and unions both opposed the challenge to the Santa Clara plan. Furthermore, if *Weber* were overruled, *Firefighters*, which dealt with consent decrees, would have to be overruled since that decision built on *Weber*. Overruling *Weber* would thus disrupt the myriad employment practices and programs created as a result of consent decrees as well.

(3) Justice Scalia claims that *Weber* spawned numerous "suspensions of disbelief," including the assertions that Kaiser's plan was truly voluntary; that *Bakke* merely allowed some consideration of race in order to achieve diversity; and that the plan in *Johnson* merely required "consideration" of women and was not mandatory. 107 S. Ct. at 1174 (Scalia, J., dissenting). His claims are, at best, factually controvertible. Santa Clara County's plan in *Johnson* was indeed voluntary, regardless of the metaphysics of "voluntariness." Justice Powell's opinion in *Bakke* (which, incidentally, preceded *Weber*) did call for individual consideration; but the Powell opinion was for only one Justice, and the joint opinion of Justices Brennan, Marshall, Blackmun, and White did not take that position. And the "consideration" in *Johnson* was real. Given equal qualifications, obviously, there was a push to choose Joyce; for what does an affirmative action policy mean, if not that? Had the margin between Johnson and Joyce been substantial, however, there was evidence that Joyce would not have been the winner. *Johnson*, 107 S. Ct. at 1465 (O'Connor, J., concurring).

(4) Finally, Justice Scalia describes the outcome of this and other decisions as permitting hiring on the basis of "minimum qualifications." 107 S. Ct. at 1474 (Scalia, J., dissenting). Perhaps, but not on the record in this case. Both Joyce and Johnson were deemed "well-qualified" and were the only two candidates who had no drawbacks. Joint Appendix at 27-28, *Johnson* (No. 85-1129). Moreover, Johnson was chosen by a three-man board exercising a subjective judgment based on a selection interview. This is normally considered the most dubious kind of selection procedure, for it is subject to grave abuse. Brief for American Society for Personnel as Amicus Curiae at 10, n.4, *Johnson* (No. 85-1129) ("[E]vidence regarding the validity of the selection interview yields a distinctly disappointing picture."). Abuse was quite likely here — two of the three men who chose Johnson over Joyce had had run-ins with Joyce, and according to the district court, the actions of one of these men "may [have been] indicative of discriminatory intent." Appendix to Petition for Certiorari at 9a, *Johnson* (No. 85-1129). On such a record, it is hard to accept the charge that as a result of this decision, only the "utterly unqualified," 107 S. Ct. at 1474 (Scalia, J., dissenting), will not prevail over the "well qualified." See 107 S. Ct. at 1464-65 (O'Connor, J., concurring).

96. The Justice Department has adopted this position. A few days after the *Johnson* decision, Assistant Attorney General William Bradford Reynolds told the *New York Times* that the Department would continue its challenge to an affirmative action plan setting numerical goals for the District of Columbia Fire Department. *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987) (denying rehearing to 813 F.2d 12 (D.C. Cir. 1987.)) Mr. Reynolds said that *Johnson* had "very little impact" on the *Hammon* case, and his spokesman added that other public affirmative action plans were "still subject to challenge on constitutional grounds." Pear, *Administration Attacks Affirmative Action Plan*, N.Y. Times, Apr. 1, 1987, at A14, col. 5. *Hammon* was decided on Title VII grounds, however, though Judge Silberman's concurrence draws the distinction. 826 F.2d at 85-86 (Silberman, J., concurring). The decision is criticized in *The Supreme Court 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 309 n.68 (1987).

ment that because Title VI standards are the same as the constitutional obligations, Title VII requirements must also be the same as those of the Constitution, he declared that "the [Title VII] *statutory* prohibition with which that [public] employer must contend was not intended to extend as far as that of the Constitution."⁹⁷ And in *Paradise*, Justice Powell's concurring opinion observed that "I have not thought the standards of analysis in Title VII and Equal Protection cases — though similar — are identical."⁹⁸

Why not? Why should the constitutional standard be stiffer?⁹⁹ The Court provides no good reason, and in fact there is none.

The *Weber* majority suggested one possible reason for a difference by construing the 1964 Act, which did not apply to public agencies, to grant private employers freedom from governmental interference. The strength of this kind of interest is likely to be far less where public employers are concerned, as Justice Scalia pointed out.¹⁰⁰ But the primary goal of *Weber* and of the many other decisions construing congressional intent in Title VII was to encourage voluntary remediation of the effects of past or present exclusion,¹⁰¹ and this certainly applies with at least as much force to public as to private employers. Given *Weber*, it would be "anomalous" (as Justice O'Connor said in *Wygant*) if "what private employers may voluntarily do to correct apparent violations . . . public employers are constitutionally forbidden to do."¹⁰²

Moreover, the statutory provisions on which the Court relied in *Weber* and in *Firefighters* — sections 703(a), (d), and (j), and section 706(g) of Title VII — draw no distinctions between public and private employers. Nor does the legislative history of the 1972 amendments.

97. *Johnson*, 107 S. Ct. at 1449 n.6 (emphasis in original).

98. *Paradise*, 107 S. Ct. at 1075 n.1 (Powell, J., concurring). It seems likely that Chief Justice Rehnquist would also find the constitutional standard more stringent. See *Bushey v. New York State Civil Serv. Commn.*, 469 U.S. 1117, 1121 (1985) (Rehnquist, J., dissenting from denial of certiorari).

99. See *Bushey v. New York State Civil Serv. Commn.*, 733 F.2d 220, 227 n.8, *cert. denied*, 469 U.S. 1117 (1985); but see *Williams v. New Orleans*, 729 F.2d 1554, 1565, 1574 (5th Cir. 1984) (Gee, J., concurring; Wisdom, J., concurring and dissenting).

100. *Johnson*, 107 S. Ct. at 1472; but cf. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (state employment practices not subject to federal regulation), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

101. See, e.g., *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 611 n.9 (1984); *Johnson*, 107 S. Ct. at 1451; *Weber*, 443 U.S. at 203-07; *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

102. *Wygant*, 106 S. Ct. at 1855. Even the Solicitor General recognized that inconsistencies between Title VII and the Constitution would be "unfortunate." Amicus Brief of the Solicitor General at 9 n.5, *Johnson*, 107 S. Ct. 1442 (1986). See also the virtual identity of the constitutional and Title VII standards in sections V and IV(E) of Justice Brennan's opinion in *Sheet Metal Workers*. Justice Powell cited constitutional and Title VII precedents in *Sheet Metal Workers* without distinguishing between them. 106 S. Ct. at 3055-56.

To the contrary, as Senator Harrison Williams, floor leader for the 1972 amendments, put it: "At this time in our country's history, it should be beyond question that the employees of State and local governments are entitled to the same benefits and protections in equal employment as are employees in the private sector."¹⁰³ This history indicates rather that Congress added state and local agencies to improve *enforcement* of anti-discrimination laws against these agencies,¹⁰⁴ not to change the substantive standards.

Admittedly, it is logically possible for Title VII standards to be identical for private and public employers, and for public agencies to be subject also to higher constitutional standards. But if Congress thought there would be such a difference between public and private employers, with the constitutional provisions significantly more stringent than those of Title VII, it surely would have so indicated.

What was really at stake here was maintaining a majority for upholding affirmative action. Three justices have voted for affirmative action in every case to come before the Court — Brennan, Marshall, and Blackmun — and Justice Stevens has voted similarly in each of the recent five cases. Justice Powell was the crucial fifth vote. Not only was he the only Justice to be on the winning side in every single affirmative action case in which he participated since *Bakke* (which marked the beginning of the Court's sharp division) but his vote was crucial to upholding affirmative action plans in *Bakke*, *Sheet Metal Workers*, and *Paradise*, three of the six cases on which he sat which upheld plans. In all the constitutional decisions from *Bakke* to *Paradise*, Justice Powell read the constitutional requirements very strictly, at least on the surface. If a majority for affirmative action was to be held together, either Justice Powell or Justice O'Connor had to be persuaded to vote for it, and Justice Powell was the more important because he seemed more sympathetic.¹⁰⁵

103. LEGISLATIVE HISTORY, *supra* note 95, at 1113; *see also id.* at 1115.

104. S. REP. NO. 415, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 95, at 419-20, 434 ("By placing the full weight of the U.S. Attorney General and the authority of the U.S. district courts behind equal employment opportunity at the state and local government level, the committee believes that the machinery has been provided to insure state and local leadership in the area of equal employment opportunity."); *see also* H.R. REP. NO. 238, 92d Cong., 1st Sess. (1971), *reprinted in* LEGISLATIVE HISTORY, *supra* note 95, at 78-79.

105. In contrast to Justice Powell, Justice O'Connor voted against affirmative action plans in both *Sheet Metal Workers* and *Paradise*, wrote a concurring opinion in *Firefighters* to stress the narrowness of the holding and is clearly critical of *Weber*. *See* Joint Appendix at 1-2, *Johnson* (No. 85-1129).

Justice Powell's newly confirmed successor, Justice Kennedy, has expressed support for voluntary affirmative action in university admissions policies, in private employment, and in employment consent decrees. *See* *Nomination Hearings of Anthony M. Kennedy to be an Associate Justice of the Supreme Court Before the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 85-87 (transcript, Dec. 16, 1987).

III. THE CONSTITUTIONAL STANDARDS

What then are the constitutional standards? Will they indeed prove to be more difficult to meet than those of *Weber* and Title VII?

There is an initial confusing complexity. Affirmative action plans may prefer either racial/ethnic minorities, or women, or both. But the constitutional rules on discrimination are usually different for racial and gender discrimination,¹⁰⁶ even though the Court in *Johnson* held that the Title VII statutory standards are the same. Since the Court's constitutional affirmative action decisions have dealt only with the racial variety, this discussion will initially focus on race, with the difficulties arising from the difference in constitutional treatment of minorities and women to be explored later.

There are three fundamental questions: (A) the level of scrutiny; (B) the nature of the prior discrimination that can justify an affirmative action program; and (C) the narrowness of the "tailoring."

A. *The Level of Scrutiny*

1. *Where the Justices Stand*

In equal protection cases, the conventional first step is to determine the subject matter and group affected by the official classification. This is generally, though often wrongly, thought to be the decisive issue, for that subject matter — e.g., race, gender, economic regulation, or fundamental rights — supposedly determines the level of scrutiny the Court will give the classification. If the subject calls for merely a rational basis for the differential treatment, it is generally true that almost anything goes;¹⁰⁷ if that scrutiny is strict, almost nothing goes;¹⁰⁸ and if, as in gender and illegitimacy cases, the scrutiny is "intermediate," some things will go and some won't.¹⁰⁹

In trying to contain the damage that the Court did to his position in its 1986 decisions, Assistant Attorney General William Bradford Reynolds insisted that "it is now a matter of Supreme Court jurisprudence that the constitutional level of scrutiny of *any* race-based classification remains equally exacting whether the challenged classification

106. The difference was noted and was part of the reason that the Ninth Circuit upheld a 2% set-aside of municipal purchasing for women-owned businesses, while striking down a 10% minority set-aside. *Associated Gen. Contractors v. San Francisco*, 813 F.2d. 922 (9th Cir. 1987).

107. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

108. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); Gunther, *In Search of Evolving Doctrine On A Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Justice Powell seemed to recognize this. See *Fullilove*, 448 U.S. at 507 (concurring opinion).

109. Compare *Craig v. Boren*, 429 U.S. 190 (1976), with *Kahn v. Shevin*, 416 U.S. 351 (1974) (gender); *Lalli v. Lalli*, 439 U.S. 259 (1978), with *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimate children).

is employed against a group that has historically been subject to government discrimination or operates in reverse."¹¹⁰

Mr. Reynolds is wrong. As Justice Brennan insisted in both *Paradise* and *Sheet Metal Workers*, there is no clear majority "on the proper test to be applied" in affirmative action cases.¹¹¹ Chief Justice Rehnquist and Justices Powell, O'Connor, and Scalia have urged adoption of the strict scrutiny test.¹¹² But Justice Stevens in *Paradise* and *Wygant* seems to have adopted a rational-basis-with-bite test,¹¹³ and in *Bakke*, Justices Brennan, Marshall, Blackmun, and White urged the intermediate test in their joint opinion. Justice White's position remains ambiguous.¹¹⁴ For though he has apparently become hostile to race- or gender-conscious action, in every constitutional case after *Bakke* — *Fullilove*, *Wygant*, *Sheet Metal Workers*, and *Paradise* — he has consistently declined to join the Powell or O'Connor opinions urging strict scrutiny, even when, as in *Fullilove*, *Paradise*, and *Wygant*, he came out the same way as one or both of them. Instead, he chose in *Fullilove* to join the Chief Justice's opinion which refused to pick among the tests, and he wrote entirely by himself in *Wygant* and *Paradise*.¹¹⁵

110. Remarks of Assistant Attorney General William Bradford Reynolds to the A.B.A., at 3 (Aug. 12, 1986) (emphasis in original) [hereinafter Reynolds A.B.A. Speech].

111. *Paradise*, 107 S. Ct. at 1064; *Sheet Metal Workers*, 106 S. Ct. at 3052.

112. Justice Scalia joined the O'Connor dissent in *Paradise*, which adopted the strict scrutiny test. *Paradise*, 107 S. Ct. at 1080.

113. After concluding that the Board had "a rational and unquestionably legitimate basis" for the plan, he stressed that the Court "should not lightly approve the government's use of a race-based distinction," and scrutinized it for fair adoption procedures, narrow breadth, and value transcending the harm to the petitioners. *Wygant*, 106 S. Ct. at 1868, 1870 (Stevens, J., dissenting). These requirements obviously go beyond the conventional rational basis test. For Justice Stevens's general disagreement with the tiered analysis the Court uses, see his concurrence in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 451-55 (1985).

114. Although Justice White formally joined with Justices Brennan, Marshall, and Blackmun in issuing the joint *Bakke* opinion, and explicitly affirmed his joinder on this issue ("My views . . . with respect to the equal protection issue . . . are included in the joint opinion that my brothers Brennan, Marshall and Blackmun and I have filed"), he added a mysterious footnote: "I also join Parts I, III-A and V-C of Mr. Justice Powell's opinion." 438 U.S. at 387 & n.7. (This was noted in Justice Powell's opinion in *Wygant*, 106 S. Ct. at 1846, which, however, Justice White did not join.) Part III-A of the Powell opinion makes two points: it first rejects the distinction between goals and quotas — a distinction on which Justice White relied in his *Sheet Metal Workers* dissent, 106 S. Ct. at 3062 — and then explicitly declares that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 438 U.S. at 291 (emphasis added). Although Justice White may have joined in that portion of the Powell opinion primarily because of its discussion of the quota-goal difference, he made no such distinction in *Bakke*, and his strong hostility to relief for nonvictims in *Stotts*, as well as his somewhat grudging acceptance of relief for nonvictims in *Sheet Metal Workers* both indicate support for the strictest standard. See Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471 (1987).

115. White joined the Rehnquist opinion dissenting from a denial of certiorari in *Bushey v. New York State Civil Serv. Commn.*, 469 U.S. 1117 (1985), but that opinion focused on whether

2. *Should the Court Adopt Strict Scrutiny?*

There is no good reason for the Court to adopt conventional strict scrutiny — “strict in theory but fatal in fact”¹¹⁶ — for the affirmative action programs considered by the Court. The opportunity for employment, education, or government contracts is clearly not a fundamental right,¹¹⁷ and whites display none of the usual indicia of a suspect class — one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹¹⁸ Moreover, whites have not been “subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities,”¹¹⁹ nor do they constitute a “discrete and insular minorit[y],”¹²⁰ in need of “extraordinary protection from the majoritarian political process.”¹²¹ Nor, like women, are whites as a group subject to classifications that “generally provide[] no sensible ground for differential treatment” or rely upon “outmoded notions of . . . capabilities.”¹²² If anything, white males have in the past gotten and still do get many preferences, though now these are often subtle or disguised.¹²³

But these programs classify by race, and racial classifications, we are told, are so inherently pernicious that a classification disadvantaging the racial majority must be treated exactly the same as a classification disadvantaging racial minorities. Among the anticipated dangers are:

Government recognition and sanction of racial classifications *may be* inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government’s educative role on behalf of equality and neutrality. It *may* also have unexpected results,

a state agency could voluntarily adopt an affirmative action plan without a preliminary finding of discrimination.

It should be noted that former Chief Justice Burger also seemed unhappy with the three-tiered approach; see his concurrence in Justice Stevens’s opinion in *Cleburne*, 473 U.S. at 451, and his opinion in *Fullilove*, 448 U.S. at 453. Nevertheless, he joined the Powell opinion in *Wygant*.

116. Gunther, *supra* note 108, at 8.

117. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam); *Dandridge v. Williams*, 397 U.S. 471 (1970); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

118. *Rodriguez*, 411 U.S. at 28.

119. *Murgia*, 427 U.S. at 313.

120. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

121. *Murgia*, 427 U.S. at 313.

122. *Cleburne*, 473 U.S. at 440-41.

123. All of these factors apply equally to males affected by gender-conscious programs for women.

such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose *may* become perverted: a benign preference under certain conditions *may* shade into a malignant preference at other times. Moreover, a racial preference for members of one minority *might* result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity.¹²⁴

Obviously, these are not trivial or frivolous considerations. But they are only *possibilities*. Few are likely to occur often or to impose great harm even if they do. Such harm as these race-conscious plans do create is also relatively easy to remedy, unlike the race-prejudice against minorities, by simply terminating the program. With respect to either probability or harm, these considerations do not compare with the bases for giving the maximum suspect-class status to racial or ethnic minorities.

And the reality is that Justice Powell and at least some of the concurring Justices in *Wygant*, like Justice O'Connor and perhaps Justice White, have not really insisted on this conventional strict scrutiny. An essential element of the justification for such tight judicial oversight was noted by Justice White in the *Cleburne* case: "[R]ace, alienage, or national origin . . . are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."¹²⁵ Accordingly, the Court has approved no anti-minority racial or ethnic programs since the Japanese internment case in World War II.¹²⁶ But a very large number of race-preferential affirmative action plans apparently remain acceptable to the proponents of strict scrutiny. In *Bakke* for example, Justice Powell apparently approved Federal Executive Order 11246.¹²⁷ It has been estimated that over two-thirds of American workers are covered by affirmative action plans under the Order.¹²⁸ Countless other employees are in voluntary plans approved by *Weber* but not required by Executive Order 11246, and still more are in plans resulting from

124. *Associated Gen. Contractors v. Altshuler*, 490 F.2d 9, 17-18 (1st Cir. 1973) (emphasis added) (footnotes omitted). See also *Bakke*, 438 U.S. at 360-62 (joint opinion); Liebman, *supra* note 114, at 488.

125. *Cleburne*, 473 U.S. at 440; see also *Fullilove*, 448 U.S. at 498 (Powell, J., concurring); *Edwards v. California*, 314 U.S. 160, 184 (1941); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 356-61 (1949).

126. *Korematsu v. United States*, 323 U.S. 214 (1944).

127. *Bakke*, 438 U.S. at 301 n.40. Executive Order No. 11246, 3 C.F.R. § 339 (1964-1965), reprinted in 42 U.S.C. § 2000e (1982), requires federal government contractors to adopt statistical goals and timetables for women and minorities.

128. Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 11 n.47.

court orders and consent decrees, all almost certainly legitimate under the Court's recent and past affirmative action cases. At least in raw numbers, racial classifications helping minorities have been found acceptably "relevant" very often indeed.

The willingness of Justices O'Connor and Powell to accept the "promotion of racial diversity . . . at least in the context of higher education" as a compelling goal,¹²⁹ even in the diluted "flexible" form approved in *Bakke*,¹³⁰ is also inconsistent with a proper (or at least conventional) application of strict scrutiny, for that kind of diversity is not the real purpose for affirmative action in medical school admissions. A recent study found that:

The chief goal of affirmative-action programs in medical schools in the United States was to increase the numbers and the proportion of minority physicians. Other objectives were to make more minority physicians available to improve the health care of the poor, to supply physicians to underserved communities, and to increase the number of physicians providing primary care.¹³¹

Reliance on what was at best a very minor purpose is not usual where strict scrutiny is applied.

Justice Powell's *Fullilove* opinion was an especially revealing indicator of how weakly he adhered to the strict scrutiny test. As Justices

129. See *Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring) (citing Justice Powell's opinion in *Bakke*, 438 U.S. at 311-15). Justice White seems to share Powell's acceptance of this goal. See *Bakke*, 438 U.S. at 387 n.7 (White, J., concurring in part V-C of Justice Powell's opinion).

130. See 438 U.S. at 315-20. The Harvard plan approved by Justice Powell contains numerical goals, though they are purportedly quite flexible. 438 U.S. at 323-24.

131. Keith, Bell, Swanson & Williams, *Effects of Affirmative Action in Medical Schools*, 313 NEW ENG. J. MED. 1519 (1985). See also Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 122 (1979) ("I have yet to find a professional academic who believes the primary motivation for preferential admissions has been to promote diversity in the student body for the better education of all the students while they are in professional school."); Lesnick, *What Does Bakke Require of Law Schools?*, 128 U. PA. L. REV. 141, 154 (1979) ("[A] far more significant social-educational goal . . . is . . . ameliorating the extreme relative unavailability of legal representation to members of racial and ethnic minorities."); R. FULLINWINDER, *THE REVERSE DISCRIMINATION CONTROVERSY*, 207 (1980) ("[I]t is difficult to understand what is 'compelling' about the interest in student diversity.").

In *Bakke*, Justice Powell rejected the goal of more doctors in underprivileged areas, but only because he found "virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal," *Bakke*, 438 U.S. at 310, or that the program would achieve it. He did not reject that goal in principle. Justice Powell's *Fullilove* opinion approving the legislation setting aside 10% of federally funded contracts for minority-owned businesses indicates he might have been ready to accept even a numerical goal to achieve that goal had Congress — or perhaps even a state legislature — made a finding that a racial preference was necessary.

Incidentally, it appears that minority doctors do practice more in underprivileged areas: Minorities were not merely admitted to medical schools in much larger numbers; they also graduated, took residency training, and entered practice in much larger numbers. Moreover, they entered primary-care specialties, chose to practice in federally designated health-manpower shortage areas, and cared for ethnic minority and poor patients in a greater proportion than did their nonminority counterparts.
Keith, Bell, Swanson & Williams, *supra*, at 1524.

Stewart and Stevens pointed out, the plan was both underinclusive and overinclusive and the legislative findings were thin, to say the least.¹³² Yet in deference to Congress (and perhaps to any legislative or administrative body) Justice Powell approved the plan. If all racial distinctions "of any sort" are to be treated similarly, would he have approved such a plan affecting minorities *unfavorably*?

Other Justices have responded favorably to Justice Powell's suggestion that racial preferences favoring minorities are frequently "relevant." Justice O'Connor, for example, has raised "the possibility that the Court will find other governmental interests which have been relied upon in the lower courts . . . to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."¹³³ These interests could include operational needs,¹³⁴ faculty diversity,¹³⁵ and improving the opportunities for minorities to obtain government contracts.¹³⁶

The insistence on strict scrutiny is also at odds, though not directly inconsistent with, at least some of the reasons for the Court's requirement that where a statute is facially neutral, intentional discrimination must be shown in order to establish a constitutional violation. Although the basis for this insistence on intent is not altogether clear,¹³⁷ one obvious reason is that it is illegitimate for the majority deliberately to use its power to manifest its prejudice and antipathy toward a weaker group by harming it. If, however, the weaker group

132. 448 U.S. at 528-30 (Stewart, J., dissenting); 448 U.S. at 539-44 (Stevens, J., dissenting).

133. *Wygant*, 106 S. Ct. at 1853.

134. *Wygant*, 106 S. Ct. at 1868 (Stevens, J., dissenting); *Detroit Police Officers' Assn. v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979); *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974). This goal is especially important for public agencies, as Congress pointed out when it extended Title VII in 1972 to state and local employees. The House Education and Labor Committee found that:

[t]he problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) with the result that the credibility of the government's claim to represent all the people equally is negated. H.R. REP. NO. 238, 92d Cong., 1st Sess. 17 (1971). The Cities of Birmingham, Detroit, Los Angeles, and the District of Columbia filed amicus briefs in *Paradise* making this point, but the Brennan plurality opinion found it unnecessary to decide whether this goal was sufficiently compelling. 107 S. Ct. at 1065 n.18. For a discussion of how Detroit's affirmative action plan improved police-community relations, see Schwartz, *Affirmative Action*, in MINORITY REPORT 58, 71 (L. Dunbar ed. 1984).

135. *Wygant*, 106 S. Ct. at 1854 n.* (O'Connor, J., concurring) (issue not raised and therefore need not be discussed).

136. See, e.g., *Fullilove*, 448 U.S. at 462-63 (upholding program that set aside 10% of federally funded local public works projects for minority-owned businesses); *Ohio Contractors v. Keip*, 713 F.2d 167 (6th Cir. 1983) (upholding program earmarking 5% of yearly state construction contracts for minority business enterprises). See also Justice Stevens's opinions in *Johnson* and *Wygant*. But see cases cited in note 196 *infra*.

137. Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397.

is incidentally injured by an unprejudiced and otherwise properly motivated act, then, as in the veterans' preference decision, there is no constitutional violation. As Justice Stewart put it in that case, "[d]iscriminatory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹³⁸ Indeed, even where there is an explicit racial classification, invidious intent is necessary.¹³⁹

Affirmative action plans do not arise from "prejudice or antipathy" toward whites, and any resulting harm to them is incidental and unintended. There is no "invidious intent." Like the veterans' preference, preferential plans to benefit disadvantaged groups are adopted "in spite of," not "because of," any adverse impact on the majority, for their purpose is only to help those groups to overcome the disadvantages, not to harm anyone. Those handicaps are analogous to the veteran's sacrifices for the nation and his problems in making the transition from military to civilian life that are the justification for the veterans' preference.¹⁴⁰ If there were enough jobs for all who wanted them, affirmative action plans would not disadvantage whites either in intent or effect,¹⁴¹ whereas actions motivated by racial prejudice are intended to harm, regardless of whether there are enough to go around. That is a difference of both constitutional and moral dimensions.¹⁴² Indeed, some affirmative action plans like those in *Weber* and *Firefighters* actually increase job opportunities for whites.¹⁴³

138. *Personnel Admin. v. Feeney*, 442 U.S. 256, 279 (1979); *NAACP v. Allen*, 493 F.2d at 619 (without invidious intent, no constitutional violation).

139. See, e.g., *United Jewish Org. v. Carey*, 430 U.S. 144, 165 (1977) (redistricting "plan represented no racial slur or stigma with respect to whites or any other race") (emphasis added); *Tancil v. Wools*, 379 U.S. 19 (1964) (per curiam), *affg.* *Hamm v. Virginia State Bd. of Election*, 230 F. Supp. 156 (E.D. Va. 1964) (racial statistics in divorce decrees); *Wygant*, 106 S. Ct. at 1865-66 (Stevens, J., dissenting) (dictum discussing choice of informers to infiltrate racially homogeneous group); *Lee v. Washington*, 390 U.S. 333, 334 (1968), (Harlan, Black & Stewart, JJ., concurring) (racial tensions in prison can justify segregation).

140. *Feeney*, 442 U.S. at 265. See Thomson, *Preferential Hiring*, 2 PHIL. & PUB. AFF. 364, 379-80 (1973); but see R. FULLINWINDER, *supra* note 131, at 46-48 (questioning moral basis for veterans' preference).

141. See Dershowitz & Dershowitz, *Dialogue: Assessing Affirmative Action*, MOMENT, June, 1983, at 33, 35-36.

142. See Fiss, *supra* note 125, at 152; *Wygant*, 106 S. Ct. at 1869 (Stevens, J., dissenting). The centrality of prejudice and hostility is reflected also in Tussman & tenBroek, *supra* note 125, at 358 (discussing suspect classifications: "[T]he prohibition against discriminatory legislation is a demand for purity of motive. . . . It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility . . ."). See also R. FULLINWINDER, *supra* note 131, at 214-15 (supporting intermediate standard for a racial classification that "does not stigmatize or imply racial hostility").

143. The affirmative action program in *Weber* created a craft training program that white workers had unsuccessfully sought for years. Memorandum of United Steelworkers of America in Opposition to Request by the United States for Summary Remand at 6, *Weber* (No. 78-432).

Should Justice Powell's approach be followed by a future majority, equal protection law in practice will have not three tiers of scrutiny but five:

- (1) true strict scrutiny for racial and ethnic classifications that exclude and stigmatize;
- (2) less strict scrutiny for affirmative action racial preferences;
- (3) intermediate scrutiny for classifications affecting gender and illegitimacy;
- (4) heightened rational scrutiny for the mentally retarded and perhaps other special categories, like the mentally disturbed;¹⁴⁴ and
- (5) traditional rational scrutiny for conventional economic and welfare regulation.¹⁴⁵

An anomaly of this array is that despite Justice Powell's claim that the first two categories are really one,¹⁴⁶ in practice, the scrutiny given affirmative action may be weaker than intermediate. The latter has often resulted in close and controversial decisions striking down classifications that disadvantaged either women, men, or illegitimate children, whereas all that seems necessary to validate affirmative action not involving layoffs is prior discrimination. In practice, this may not be too difficult to establish,¹⁴⁷ and even if it is, other justifications are possible, as noted above.

Does it make much difference what standard is adopted, if the Court applies it with wisdom and sensitivity? Insofar as affirmative action is concerned, so long as the Court allows some of these programs to survive, the important issues would seem to revolve more

In *Firefighters*, the plan increased the number of available supervisory positions. 106 S. Ct. at 3068-69.

144. See *Cleburne*, 473 U.S. at 455 (Marshall, J., concurring in the judgment); *Deibler v. Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986); *Ferguson v. Garmon*, 643 F. Supp. 335 (D. Kan. 1986); *Sullivan v. Pittsburgh*, 620 F. Supp. 935 (D. Pa. 1985); *Coburn v. Agustin*, 627 F. Supp. 983 (D. Kan. 1985).

145. With the exception of affirmative action, the degree of scrutiny actually given the different classifications seems to depend on the relative levels of community prejudice and relevance. Thus, racial characteristics score high on prejudice and low on relevance, whereas conventional economic regulation has the opposite relationship as to each. The scrutiny given classifications based on gender, illegitimacy, and retardation involves significant prejudice but also is often relevant to classifications based on retardation, and occasionally on gender and illegitimacy classifications. Affirmative action seems to involve high relevance and little or no prejudice, making it like conventional rational scrutiny. But the Court has discerned possibilities of significant prejudice, see text at note 86 *supra*, and, if my reading is correct, has added a concern for excessive unfairness. Other exceptions to conventional rational-scrutiny analysis also occasionally appear where vital necessities are concerned, see, e.g., *United States Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973) (food stamps); *Wohlgemuth v. Williams*, 416 U.S. 910 (1974) (*per curiam*) (welfare), or in what is essentially a commerce clause context, where that clause is unavailable as a basis for decision, *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

146. "The level of scrutiny does not change . . ." *Wygant*, 106 S. Ct. at 1846.

147. See text at notes 200-20 *infra*.

around the stringency of the conditions for such survival than about the particular level of scrutiny the Court claims it is applying. Nevertheless, the doctrinal confusion does generate problems, particularly if public and private plans are to be treated differently.

For example, a level of scrutiny for affirmative-action "discrimination" favoring minorities that is nominally identical to the standard for discrimination against racial minorities raises the possibility that it will be watered down in the latter cases the way it seems to be in the former. If Justice Powell was willing to accept an after-the-fact invocation of ethnic diversity in *Bakke* as a "compelling" reason for discriminating against whites, even though it is very unlikely that it was the real goal, why should the courts not accept equally dubious assertions about actions aimed against racial minorities? The current Justice Department is certainly likely to argue that the courts should.

More importantly, a constitutional identification of affirmative action with the racial discrimination experienced by blacks is morally offensive. Can one seriously equate a preference intended to remedy centuries of discrimination — even if only "societal discrimination" the existence of which all concede — with the brutality inflicted on blacks and other minorities by racist laws and practices? The preference may take away some benefits from some white men, but none of them is being beaten, lynched, denied work, forced to take the dirtiest jobs, or stigmatized as an inferior being. The problems raised by setting aside a few places a year for qualified minorities out of hundreds and perhaps thousands of employees, as in the Kaiser plant in the *Weber* case,¹⁴⁸ or sixteen medical school places out of one hundred as in *Bakke*,¹⁴⁹ or 0.25% of construction work as in *Fullilove*,¹⁵⁰ or eight out of sixteen state police corporalships on an interim basis as in *Paradise*,¹⁵¹ or even fifty percent of new hires or promotions,¹⁵² are not in

148. *Weber*, 443 U.S. at 199 (seven blacks entered program during first year).

149. *Bakke*, 438 U.S. at 275.

150. *Fullilove*, 448 U.S. at 484 n.72.

151. *Paradise*, 107 S. Ct. at 1063.

152. See *Detroit Police Officers' Assn. v. Young*, 608 F.2d 671, 697 (6th Cir. 1979):

Bakke and *Weber* make it clear that a case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain, and the official actions complained of must be subjected to the analysis prescribed in *Weber* and the plurality opinion in *Bakke* which we find controlling.

the same moral universe as the brutalities inflicted by racism on blacks.

Problems of equality and fairness are not solved by an incantation of the tautological "equal means equal."¹⁵³ Rather, as Justice White put it in the *Cleburne* case, "all persons *similarly situated* should be treated alike."¹⁵⁴ When some have been handicapped seriously in applying for a job or a university admission by the accident of having been born into a racial minority, they are not "similarly situated" to those in the racial majority with respect to that job or admission.

This does not, of course, mean that one can be indifferent to the burden that a particular affirmative action program might impose on possibly innocent individual members of the white majority.¹⁵⁵ Indeed, the weight, necessity, and fairness of such a burden seem to be the most important factors in determining which plans are acceptable under the analysis developed by Justice Powell (and apparently adopted, at least in part, by Justices White and O'Connor).¹⁵⁶ But some burden on nonculpable whites is deemed acceptable even under the Reagan Administration's view that relief is to be limited to specific victims of discrimination, as well as under the Court's approval of make-whole relief for identified victims and of many affirmative action programs.¹⁵⁷ Questions about the appropriateness and extent of that burden should therefore be (and are) addressed in the discussion of whether the means to accomplish the accepted purposes of affirmative action are appropriately tailored to minimize that harm.¹⁵⁸ To deal with such questions, it is unnecessary to insist on strict scrutiny for programs that modestly open a previously-shut door, on the dubious ground that such programs have the same basic vices as the practices that originally shut those doors.

A special problem in adopting a strict standard for race-preferential affirmative action is the uncertainty this creates about affirmative

153. See, e.g., Pear, *Rights Commission Abandons Backing of Racial Quotas*, N.Y. Times, Jan. 18, 1984, at A1, col. 3, A19, col. 3 (quoting Morris Abram, member, United States Commission on Civil Rights); see also Schwartz, *supra* note 134.

154. *Cleburne*, 473 U.S. at 439 (emphasis added); see also H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961); Tussman & tenBroek, *supra* note 125, at 344.

155. *Contra Johnson*, 107 S. Ct. at 1458 n.3 (Stevens, J.).

156. See Part III.B *infra*; see also *Sheet Metal Workers*, 106 S. Ct. at Part V (Brennan, J.). Justice White has made it clear that he will not accept plans that result in what he considers the equivalent of a "discharge" of white workers. *Wygant*, 106 S. Ct. at 1857-58 (White, J., concurring). For critical comments on such considerations of "unfairness" see Fiss, *supra* note 125, at 129-36, 147-56; *Wygant*, 106 S. Ct. at 1858 (Marshall, J., dissenting) ("[U]nfairness ought not be confused with constitutional injury.").

157. E.g., *Wygant*, 106 S. Ct. at 1850 (plurality); *Fullilove*, 448 U.S. at 484; *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976).

158. See Part III.C *infra*.

action programs for women, like that in *Johnson*. Since gender discrimination is given only intermediate level scrutiny under the Constitution, will the Court treat gender-preferential affirmative action plans differently from similar plans for minorities?¹⁵⁹ Or will it insist on strict scrutiny for such plans, as the Solicitor General implied when he argued that Title VII should require strict scrutiny for both race- and gender-conscious plans and that Title VII and constitutional standards should be the same?¹⁶⁰ This would really be "anomalous," for "discrimination" against males would be treated more harshly than discrimination against females!

Strict scrutiny for gender-preferences is obviously unlikely,¹⁶¹ but if intermediate (or less) scrutiny is used for gender-conscious affirmative action under the Constitution, then these remedial plans for women will appear to be treated more leniently than those for blacks,¹⁶² even though the history of discrimination against blacks is indeed more tragic, and the problems of opening opportunities for minorities seem much more intractable.¹⁶³

B. *Discrimination as a Compelling Purpose*

1. *Societal Discrimination*

Although all members of the Court, except perhaps Chief Justice Rehnquist and Justice Scalia, seem to accept the eradication of discrimination and its effects as a compelling purpose for race- or gender-conscious action, a majority of the Court seems to reject eliminating the effects of *societal* discrimination as an adequate predicate. The

159. For an example of such treatment, see *Associated Gen. Contractors v. San Francisco*, 813 F.2d 922 (9th Cir. 1987).

160. See *Sheet Metal Workers*, 106 S. Ct. at 3050 n.47; see also Brief for the United States as Amicus Curiae Supporting Petitioners at 6 n.4, 9-10 n.5, *Johnson* (No. 85-1129). Will the Solicitor General also insist on strict scrutiny in cases involving discrimination against women? See *id.* at 9-10 n.5; see also Brief for Petitioner at 22-23, *Johnson*.

161. For example in *Bakke*, Justice Powell rejected the intermediate scrutiny test for race-conscious affirmative action because he did not consider the history of gender discrimination to be as lengthy or as tragic as the history of race prejudice, or the analytic problems for affirmative action in gender cases as great as those in racial cases. 438 U.S. at 302-03. Chief Justice Rehnquist has gone so far as to suggest that gender classifications in general, particularly those involving discrimination against men, are entitled only to rational basis scrutiny. *Craig v. Boren*, 429 U.S. 190, 221-22 (1976) (Rehnquist, J., dissenting). Whether Chief Justice Rehnquist will maintain that position when the alleged discrimination arises in an affirmative action context is dubious: since *United Jewish Org. v. Carey*, 430 U.S. 144 (1977), he has not voted to sustain any affirmative action plan.

162. See *Associated Gen. Contractors v. San Francisco*, 813 F.2d 922, 941-42 (9th Cir. 1987).

163. Women seem to be doing much better than blacks. See, e.g., *Enrollment of Minorities in Colleges Stagnating*, N.Y. Times, Apr. 19, 1987, § 1, at 1, col. 1 (black enrollment in university admissions declining).

same Justices who insisted on strict scrutiny in *Wygant* for constitutional cases take this position and Justice Scalia would almost certainly vote with them on this issue. Although Justice White, a co-author of the joint *Bakke* opinion which explicitly accepted societal discrimination, took no position on this issue in *Wygant*, in *Firefighters* he expressed a willingness to accept remedial affirmative action by an employer "only as a remedy for its own prior discriminatory practices disfavoring members of that race."¹⁶⁴ He thus seems ready to make a bloc of four. Whether a majority can be mustered for this view will depend on Justice Powell's successor, Justice Kennedy.

Justice Powell, who himself was the leading proponent for this position as well as for the insistence on strict scrutiny, discussed the matter twice, and in somewhat different ways. In *Wygant* he wrote:

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved The role model theory [adopted by the lower courts] allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. . . . Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind.¹⁶⁵

Eight years earlier, in *Bakke*, he had offered a somewhat related reason. In responding to the joint opinion he commented, "No one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups."¹⁶⁶ He rejected, however, the contention that

but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants — nothing is said about Asians . . . — would have made better scores. Not one word in the record supports this conclusion, and the authors of the [joint] opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications.¹⁶⁷

None of Justice Powell's arguments stand up. In the first place, the Court did uphold a racial classification in *Fullilove* without a finding of discrimination by the actor — in that case, the United States

164. *Firefighters*, 106 S. Ct. at 3081 (White, J., dissenting).

165. 106 S. Ct. at 1847-48. Justice O'Connor agreed with Justice Powell in rejecting societal discrimination as a predicate. 106 S. Ct. at 1854.

166. 438 U.S. at 296 n.36.

167. 438 U.S. at 296 n.36.

Congress — as Justice Stewart pointed out in his dissent.¹⁶⁸ In *Fullilove* Justice Powell himself relied on discrimination by broad social forces, not including the actor: the legislative history he cited and quoted, focused on “a business system which has traditionally excluded measurable minority participation.”¹⁶⁹ And Chief Justice Burger noted that *United Jewish Organizations v. Carey*¹⁷⁰ allowed a state to use racial criteria to ensure compliance with voting rights legislation “even though the state action does not entail the remedy of a constitutional violation” by anyone.¹⁷¹

The rejection of societal discrimination as a predicate is also inconsistent with Justice Powell’s approval in *Bakke* of many affirmative action programs on the ground that they were all legitimately predicated on prior discrimination. The plans adopted under Executive Order 11246 certainly didn’t involve any individualized misconduct, for the Order — a governmental act mandating such plans — is not limited to the bad actors.¹⁷² Furthermore, statutory preferences for women have often been constitutionally justified as compensation for long-standing societal discrimination against them.¹⁷³

Perhaps even more significant is the fact that both *Weber* and *Johnson* allow voluntary racial classifications under Title VII without a prior finding of discrimination by the actor or even an “arguable violation.”¹⁷⁴ The *Weber* trial court had found and it was “all but concede[d]” that Kaiser had not been guilty of any discriminatory practices and in *Johnson* there was a similar finding.¹⁷⁵ *Weber* stressed the blatant societal discrimination against blacks that was the impetus for Title VII,¹⁷⁶ focusing on the exclusionary practices of craft unions,

168. 448 U.S. at 528; see also *Cox*, *supra* note 95, at 95-96.

169. H.R. REP. NO. 1791, 94th Cong., 1st Sess. 182 (1977), quoted in *Fullilove*, 448 U.S. at 505.

170. 430 U.S. 144 (1977).

171. *Fullilove*, 448 U.S. at 483.

172. See *Cox*, *supra* note 95, at 95-96.

173. See, e.g., *Kahn v. Shevin*, 416 U.S. 351 (1974); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Bakke*, 438 U.S. at 365 (joint opinion).

174. See *Weber*, 443 U.S. 192, 212 (1979) (Blackmun, J., concurring) (rejecting an “arguable violation” as a prerequisite to a voluntary program).

175. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 224 (5th Cir. 1977). The Supreme Court did not question this finding but noted only that “blacks had long been excluded from craft unions,” which prevented formation of a pool of qualified black craft workers. 443 U.S. at 198. The Court also stressed that the employer need not even be “motivated by a fear of liability,” citing legislative history indicating that Congress’s goal in adopting Title VII was to “open employment opportunities for Negroes in occupations which have been traditionally closed to them.” 443 U.S. at 208 n.8 (quoting 110 CONG. REC. 6548 (1964) (remarks of Senator Humphrey)).

176. 443 U.S. at 202-03. The Solicitor General recognized this in *Johnson* but concluded that it therefore could not be a predicate for a remedy, stating that:

who were not before the Court, and whose practices had segregated and closed the crafts to blacks.¹⁷⁷ In his important concurrence,¹⁷⁸ Justice Blackmun also pointed to "a societal history of purposeful exclusion," including "segregated and inferior trade schools for blacks in Louisiana," citing a Civil Rights Commission Report.¹⁷⁹

In *Johnson*, there was even less. Whereas one could point specifically to discrimination by the craft unions to explain the absence of blacks in the Kaiser craft force in *Weber*, there was no such ready explanation in *Johnson*, and there was a similar finding of no discrimination by the employer.¹⁸⁰

it was precisely this tragic history of blatant societal discrimination against blacks and other minorities which served as the primary impetus behind Congress's decision to outlaw differential treatment of any employee on the basis of race or gender. Congress cannot be taken to have contemplated abandoning this nondiscrimination principle whenever an employer maintained that it was engaging in such discriminatory treatment in order to ameliorate the effects of societal discrimination. For given the clear presence of the effects of societal discrimination in 1964 (and today), this would mean that Congress intended to permit discrimination designed to benefit minorities and women in every instance and thus to render its ban on discrimination against "any individual" a nullity from its inception.

Brief for the United States at 14 n.7, *Johnson*. But as the Court has noted many times, and not just in the discrimination context, remedies can encompass measures that might not be acceptable in themselves. See *Paradise*, 107 S. Ct. at 1078 n.3 (Stevens, J., concurring), and cases cited therein.

177. 443 U.S. at 198-99, 208.

178. It was relied on frequently in the Court's *Johnson* opinion.

179. 443 U.S. at 212 & n.* (Blackmun, J., concurring). Justice White in *Firefighters* read *Weber* to be a case where "the company's prior discriminatory conduct provided the predicate for" the remedy. 106 S. Ct. at 3081. But, as noted in the text, the lower court found, and it was "all but concede[d]," that Kaiser had not been guilty of any discrimination. *Weber*, 563 F.2d at 224. Kaiser might have lost a suit against it for its own discriminatory practices, see 443 U.S. at 210 (Blackmun, J., concurring), but that is not how any court framed the issue in *Weber*.

In *Johnson*, Justice White modified his "understanding of *Weber*," casting it as a case where there was "intentional and systematic exclusion of blacks by the employer and the unions from certain job categories." *Johnson*, 107 S. Ct. at 1465 (White, J., dissenting). But if he was referring to the craft unions, they were not before the Court and were not volunteering to do anything.

Weber, incidentally, should have been a particularly strong precedent for *Wygant*, for in both cases there was the specter of successful litigation, some evidence of discrimination by the actor (though not relied on by the courts), and plans justified by the actor on other grounds.

180. Justice Scalia actually suggested that the absence of women from Santa Clara's Skilled Job Category was explained not by discrimination, but instead by self-exclusion by women because they had not wanted these jobs. He even asserted that Santa Clara County believed this, but the plan suggests otherwise, as shown by the material he quoted: "Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." *Johnson*, 107 S. Ct. at 1467 (emphasis added). The same could be said of blacks and other excluded groups; indeed, one of the purposes of affirmative action is to encourage disfavored groups to apply for jobs from which they have previously been discouraged. *Sheet Metal Workers*, 106 S. Ct. at 3051. Further, Justice O'Connor pointed to numerous references in the testimony indicating a concern with discrimination and its effects. *Johnson*, 107 S. Ct. at 1463-64.

Justice Scalia's assertion that the skilled and other job categories had been "traditionally segregated" not because of societal discrimination, but because "women themselves" don't want that work, *Johnson*, 107 S. Ct. at 1471, may be true sometimes or even often, but it is impossible to tell. Certainly Justice Scalia doesn't know. We do know that discrimination is responsible for

Obviously, more underlies the rejection of societal discrimination than precedent. One reason suggested by Justice Powell in *Wygant* is that "the role model theory employed by the District Court has no logical stopping point."¹⁸¹ But nothing in the concept of societal discrimination requires the use of the "role model theory," the educational validity of which is itself a controversial matter.¹⁸² That theory is not designed to deal with employment discrimination but, like the ethnic diversity goal in *Bakke*, is aimed at an *educational* purpose. Insofar as the goal of a plan is to eradicate the specific *employment* effects of societal discrimination, the conventional standard for goal-setting and evaluation could have been used to remedy the employment problem in *Wygant*: the achievement of a work force composition commensurate with the proportion of qualified minorities in the relevant community.¹⁸³

The reason for rejecting societal discrimination as a predicate for affirmative action suggested by Justice Powell in *Bakke* seems even

a great deal of underrepresentation in what have usually been called men's jobs. The experience of the last 15 years in construction, firefighting, police, and many other traditional male jobs shows that when women are given a chance to get these jobs, they rush to them. Brief Amici Curiae for NOW Legal Defense and Education Fund at 59-60, *Johnson* (No. 85-1129). Nor is this anything new. During World War II, many women worked very happily in defense plants. It was made clear to them, however, that theirs were only temporary jobs. As soon as the war ended and the men returned, many of the women were forced to leave the jobs. S. ROTHMAN, *WOMAN'S PROPER PLACE* 221-24 (1978); see also W. CHAFE, *THE AMERICAN WOMAN* 174-81 (1972) (women lost many of the better-paying positions, though they remained in the work force to a much greater extent than before the war); Freeman, Book Review, *THE NATION*, Apr. 25, 1987, at 550 (reviewing R. MILKMAN, *GENDER AT WORK* (1987)).

The burden of proof should not be on those seeking to show that the exclusion was the result of discrimination. There is enough of a history of discrimination against women to presume that in many if not most contexts it was discrimination rather than self-selection that produced the exclusion. The Court seems to have adopted this position, *Johnson*, 107 S. Ct. at 1450, and it is one basis for the heightened scrutiny given intentional gender classifications in constitutional cases. Such a presumption is particularly appropriate when we deal not with a specific job but with a broad category like "Service and Maintenance," "Skilled Craft Worker," "Professional," "Officials and Administrators," or "Technicians," each of which encompasses many different jobs, and in each of which women were substantially underrepresented in Santa Clara County's work force.

181. 106 S. Ct. at 1847.

182. See Clague, *Voluntary Affirmative Action Plans in Public Education: Anticipating a Supreme Court Decision*, 14 J.L. & EDUC. 309, 344-48 (1985) (criticizing theory that black teachers are critical to serve as role models that spur black children's scholastic performance as lacking an empirical basis). The school board's own lawyer in *Wygant* had grave doubts about the "role model" theory, and suggested that the lower court had meant only that an integrated student body needs an integrated faculty. Wagner, *Affirmative Action at the Crossroads*, A.B.A. J., May 1, 1986, at 38, 40. The problem of measuring any correlation between an integrated faculty and the improved performance of black children, of course, persists.

183. Cf. *Wygant*, 106 S. Ct. at 1860 n.3 (Marshall, J., dissenting). See also *Johnson* and *Weber*, where the comparison for determining whether a job classification is traditionally segregated is with the overall workforce, but the goals can be measured otherwise. *Weber*, 443 U.S. at 214 (Blackmun, J., concurring); *Johnson*, 107 S. Ct. at 1452-53 n.10. In *Johnson*, moreover, the goals were adjusted to take availability into account. 107 S. Ct. at 1447.

weaker. While admitting that "there has been societal discrimination . . . against various racial and ethnic groups,"¹⁸⁴ he ignored the joint opinion's observation that "substantial, chronic minority underrepresentation . . . is a product of past racial discrimination,"¹⁸⁵ and instead attacked the opinion's contention that "but for this discrimination by society at large, Bakke 'would have failed to qualify for admission' because [minority] applicants . . . would have made better scores."¹⁸⁶

The conclusion that societal discrimination helped Alan Bakke in particular does seem speculative, especially in view of Bakke's own high scores. But that is hardly relevant when dealing with large groups of whites and blacks, with "chronic minority underrepresentation." It is inevitable that at least some whites would not have had their jobs, seniority, or other privileges but for the discrimination.¹⁸⁷ Chief Justice Burger said as much himself in *Fullilove*¹⁸⁸ in an opinion that Justice Powell joined, and the *Paradise* plurality opinion made the same point.¹⁸⁹ After all, one of the obvious purposes of this prior societal discrimination was to deny minorities a fair share of jobs and other benefits, thus leaving to dominant majority members a larger share than they would have had without the discrimination.¹⁹⁰

This, of course, does not deal with the problems associated with a remedy that takes its toll on particular individuals who may themselves either be guiltless or in no way beneficiaries of the prior discrimination, the problem raised by Justice Powell in *Bakke*. But that is not a problem peculiar to accepting societal discrimination as a predicate for an affirmative action remedy, for it arises even when the employer's own discrimination is the predicate.

The morality of imposing such a burden on innocent employees because of a particular individual employer's past discriminatory conduct seems especially questionable. It is one thing to make a group of largely innocent people pay for the solutions to problems that are broadly societal in nature — we all have to do that constantly,

184. *Bakke*, 438 U.S. at 296 n.36; see also *Wygant*, 106 S. Ct. at 1848.

185. *Bakke*, 438 U.S. at 366 (joint opinion).

186. 438 U.S. at 296 n.36.

187. Bok, *Goals Aren't Quotas*, Wash. Post, Feb. 25, 1986, at 15, col. 3.

188. *Fullilove*, 448 U.S. at 484-85.

189. *Paradise*, 107 S. Ct. at 1078 n.2.

190. Justice Powell had also raised difficulties with applying societal discrimination to other ethnic groups claiming to have been discriminated against. If the predicate of societal discrimination affecting the jobs in question can be shown with respect to these other groups, and if they have either sued or otherwise seek preferences, there is no analytic reason why that discrimination should not be similarly recognized. See *Bakke*, 438 U.S. at 359 n.35 (joint opinion).

whether in the form of taxes for schools not attended by any of our children, involuntary service in the armed forces, or losing seniority to veterans or others with preferences. And most members of the majority probably have benefited directly or indirectly from societal prejudice, even if the chain of causation may be hard to show in particular cases. It seems much less justifiable for one person to have to bear the burden of a remedy for another *individual's* misconduct. If only the employer discriminated against black job applicants, why should future white applicants in no way benefited by his discrimination bear the brunt of a remedy for his misconduct?¹⁹¹

It may be argued that insofar as *Weber* and *Johnson* are predicated on the "tightrope" of facing "liability for past discrimination against blacks, and . . . liability to whites for any voluntary preferences,"¹⁹² remedying societal discrimination would indeed seem irrelevant.¹⁹³ But as will be noted below, and as *Weber* plainly shows, in many cases societal discrimination becomes relevant to race/gender preferences because there is a lack of evidence of discrimination which, in turn, results not from the absence of discrimination but because neither the challengers to the plan nor the defendant have any interest in proving it.¹⁹⁴ Also, the confusion created by Justices O'Connor and White over the existence of discrimination in *Weber* and *Johnson*¹⁹⁵ is enough to justify the fears of almost any employer with an unrepresentative work force that he might be liable for a discrimination suit by minorities. Thus the "tightrope" problem remains a real one.

It seems particularly anomalous to interpret Title VII and the Constitution so as to allow private employers to respond to societal discrimination, but not to allow public employers to do so. A public agency is supported by the community and, almost by definition, is supposed to deal with societally relevant issues. Also, if the community does not like the agency's response to the societal problem, the community's executive or legislative representatives can undo the re-

191. The situation is somewhat different where union discrimination is concerned because it may be said that such discrimination was done on behalf of the members, but most cases involve employers.

192. *Weber*, 443 U.S. at 210 (Blackmun, J.).

193. The Solicitor General so argued. See Amicus Brief for the United States at 8, *Johnson* (No. 85-1129).

194. This may also have been the case in *Johnson*, see Appendix to Petition for Certiorari at 8a-9a, especially since the selection process by which *Johnson* was originally chosen — the three-member panel — could have been challenged on Title VII grounds had the panel's recommendation not been overruled. See text at notes 69-86 *supra*. Moreover, both the Court of Appeals and Justice O'Connor suggested that a *prima facie* case had been shown. *Johnson*, 770 F.2d at 758 n.5.

195. See the *Johnson* opinions of O'Connor, White & Brennan, JJ., 107 S. Ct. at 1453, 1463, 1470.

sponse, which it cannot do with the private employer's solution to such problems.

The refusal to rely on societal discrimination seems especially unwise where the discrimination may be traced to a specific third person or group not before the court with whom the defendant must continue to do business. In *Weber*, for example, the employer had to work with the craft unions, which was the group guilty of discrimination; in *Fulilove* and other government contract cases, the public entity must continue to draw on a construction industry permeated with longstanding discriminatory practices. If the employer or public entity cannot adopt an affirmative action plan and continues to do business with the industry, as it almost certainly must, then the employer or public entity will itself be participating in and perpetuating the discrimination, whether it wants to or not.¹⁹⁶

The majority's veto of public plans to deal with societal discrimination also raises doubts about the commitment of the conservative bloc of Justices to judicial restraint, a doctrine they are particularly prone to invoke against the Court's efforts to protect individual rights in this and other contexts.¹⁹⁷ As Justice Powell himself observed, it is rare for the Court to second-guess the purpose for an official classification — the issues usually revolve around means¹⁹⁸ — especially when there is no doubt, as Justice Powell conceded in *Bakke*, that societal discrimination is indeed a serious problem. Why should that judicial deference not hold equally here? After all, no one seriously doubts that racism has been pervasive and often unconscious¹⁹⁹ in many state and local practices and institutions, and that its effects are evident in many superficially neutral settings.²⁰⁰ Local agencies, in particular,

196. This is the inevitable result of four post-*Wygant* court of appeals decisions that struck down local affirmative action plans in government contracting. *Associated Gen. Contractors v. City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987) (jurisdictional statement filed Dec. 17, 1987); *Michigan Road Builders Assn. v. Milliken*, No. 86-1239 (6th Cir. Nov. 25, 1987) (not final until expiration of rehearing period); *J. Edinger & Son Inc. v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986).

197. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986), provides an especially good recent example.

198. *Wygant*, 106 S. Ct. at 1850 n.7.

199. See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

200. The seminal article on the inadequacy of the Court's traditional insistence on individual liability is Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1975). See also Marshall, *A Comment on the Non-discrimination Principle in a "Nation of Minorities,"* 93 YALE L.J. 1006 (1984). The point is made specifically in the affirmative action context by Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). See also Fiss, *supra* note 125, at 146 (noting the clash between individualism and reliance on societal discrimination).

are often in a very good position to know this, thus minimizing the problem with "competence."²⁰¹

2. *Discrimination and Statistical Disparity*

Despite her explicit rejection of societal discrimination as an acceptable constitutional predicate for a voluntary affirmative action plan, Justice O'Connor's approach may in practice be equivalent to this. Since four Justices have consistently maintained that societal discrimination should be enough, this makes a majority.

The verbal difference was set out in *Johnson*, where both the majority and the O'Connor concurrence drew a sharp contrast between *Johnson*'s Title VII interpretation and *Wygant*'s constitutional analysis. The majority held that Title VII required only a showing of a "manifest imbalance" in a "traditionally segregated job category." This "manifest imbalance need not . . . support a prima facie case against the employer,"²⁰² and an employer need not "point to its own prior discriminatory practices nor even to evidence of an 'arguable violation.'"²⁰³ Drawing on Justice Blackmun's concurrence in *Weber*, the Court went on to point out certain analytic differences between the two standards.²⁰⁴

Justice O'Connor, on the other hand, called the Court's rule "expansive and ill-defined," and insisted that the *Wygant* criteria govern: "[T]he employer must have had a firm basis for believing that remedial action was required." This can be shown if the employer can point to enough evidence of discrimination to justify a prima facie case that he has violated the law.²⁰⁵

Yet the differences between the Brennan and O'Connor positions are more apparent than real. Justice O'Connor's prima facie approach, as applied by her in *Wygant* and *Johnson*, as well as her reading of *Weber*, will usually produce the same results as the majority's "societal" approach.

Ever since *Bakke*, it has been undisputed that either "constitutional or statutory violations" can serve as an adequate predicate for public or private affirmative action.²⁰⁶ A statutory violation can be

201. See *Bakke*, 438 U.S. at 309 (agency remedying discrimination must have the competence to do so).

202. *Johnson*, 107 S. Ct. at 1451.

203. 107 S. Ct. at 1451.

204. *Johnson*, 107 S. Ct. at 1452 n.10.

205. 107 S. Ct. at 1461 (O'Connor, J., concurring).

206. *Bakke*, 438 U.S. at 302-03 (Powell, J.). The discrimination in *Southern Ill. Builders' Assn. v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972), and *Associated Gen. Contractors v. Altschuler*, 490 F.2d 9 (1st Cir. 1973) (cited by Justice Powell in *Bakke* as examples of racial hiring prefer-

either a case of disparate impact from a particular practice or policy,²⁰⁷ or disparate treatment, including a pattern or practice of such disparate treatment.²⁰⁸ But a "disparate impact" from a particular practice, and "intent" for purposes of a disparate treatment pattern-or-practice case, can each be shown by a statistical disparity. As Justice O'Connor pointed out in *Wygant*, if the proportion of racial minorities in the work force is substantially below that of the appropriate labor pool, a *prima facie* case of unlawful discrimination is made out,²⁰⁹ which is enough to justify an affirmative action plan for Justice O'Connor.

Nor is Justice O'Connor alone in her constitutional analysis. In *Wygant*, the Court was almost unanimous: as Justice Powell put it, race-preferential remedies could be justified by an after-the-fact determination that "the employer had a *strong basis* in evidence for its conclusion that remedial action was necessary"²¹⁰ — no formal preliminary finding is necessary. Moreover, as an example of a proper plan he cited *Hazelwood School District v. United States*,²¹¹ which relied on a statistical disparity between the employer's minority work

ences justified by previous discrimination), could only be statutory, because it involved discrimination "by the industries affected" — private contractors. *Bakke*, 438 U.S. at 301-02.

207. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). A "business necessity" defense for an employment practice can be raised. See *Bakke*, 438 U.S. at 308 n.44. This is probably not too relevant for present purposes, however; for if all that need be shown is a "firm basis" for believing there is a violation, then a statistical showing of disparate impact would suffice. The same reasoning would explain why the possibility of rebutting an inference of discrimination in a pattern or practice case is not material. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10, (1977); see also *Wygant*, 106 S. Ct. at 1856 ("In 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated.") (O'Connor, J., concurring).

208. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-09 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

209. *Wygant*, 106 S. Ct. at 1856; see also *Weber*, 443 U.S. at 198, 208.

In *Bushey v. New York State Civil Serv. Commn.*, 469 U.S. 1117 (1985) (Rehnquist, J., dissenting from denial of certiorari), the three most conservative members of the Court read *Weber* as requiring only a statistical imbalance. The virtual identity between *Weber* and the O'Connor formulation in *Johnson* was noted by Judge Silberman in *Hammon v. Barry*, 826 F.2d 73, 85-86 (D.C. Cir. 1987) (Silberman, J., concurring).

210. 106 S. Ct. at 1848. The Solicitor General argued that before an affirmative action plan could be adopted there had to be a judicial finding of past discrimination. Brief for the United States as Amicus Curiae Supporting Petitioners at 29-30, *Wygant*. The petitioners would have accepted an administrative finding, Brief for Petitioners at 12-13, *Wygant*, but the Solicitor General seemed to rule out an administrative finding "by a state or local entity . . . because, among other things, the states are not granted the enforcement power under Section 5 of the Fourteenth Amendment." Brief for United States as Amicus Curiae supporting Petitioners at 29-30, *Wygant*. (So much for the Administration's vaunted concern for federalism and states' rights.) The Court rejected both positions for the obvious reason that such a requirement "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring). Justice Powell's *Bakke* opinion had raised the possibility of such a requirement. 438 U.S. at 307-10.

211. 433 U.S. 299 (1977).

force and the minority proportion of the relevant applicant pool as a valid "justification for, and the limitation on, a State's adoption of race-based remedies."²¹² Justice O'Connor summarized it this way:

[D]emonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a *compelling* basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.²¹³

Thus, statistical disparities are enough to establish a prima facie case and will be enough to provide an employer with a "firm basis for believing that remedial action is required."²¹⁴ This is virtually the same as the *Johnson/Weber* prerequisite of a "manifest imbalance" in a "traditionally segregated job classification."²¹⁵

The specific differences between the *Johnson* majority and the O'Connor approach discussed by Justice Brennan are also more minor than they appear. Although Justice Brennan seemed to argue at one point that the *Wygant* prima facie case would have to consider the disparity between the employer's work force representation and the available *qualified* pool, whereas the *Johnson* "manifest imbalance" test compares the representation in employer's force with that of the *entire* work force,²¹⁶ at another point he indicated that the latter comparison applies only to entry level or training positions. Further, Justice Brennan cited *Hazelwood* for the proposition that where special qualifications are concerned, the "manifest imbalance" would be mea-

212. *Wygant*, 106 S. Ct. at 1847.

213. *Wygant*, 106 S. Ct. at 1856 (emphasis added); see also *Teamsters*, 431 U.S. at 339 n.20.

214. *Wygant*, 106 S. Ct. at 1853; see also 106 S. Ct. at 1856 ("[W]hen the Board introduces its statistical proof as evidence of its remedial purpose, [it] thereby suppl[ies] the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate . . ."). That the defense might be able to rebut the prima facie case will not normally be relevant for the reasons discussed in note 207 *supra*, though there may be instances where a valid defense is so obvious that the plaintiffs will be able to show that there was clearly no discrimination. *Sheet Metal Workers*, 106 S. Ct. at 3061-63 (dissenting opinions of O'Connor & White, JJ.). The idea that a statistical disparity is enough for the adoption of a voluntary plan because the disparity is enough for a prima facie case, is not new. The lower courts have all been applying it for some time, with little disagreement. See, e.g., *Kirkland v. New York State Dept. of Correctional Serv.*, 711 F.2d 1117, 1130 (2d Cir. 1983); *Bushey v. New York State Civ. Serv. Commn.*, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); *Guardians Assn. v. Civil Serv. Commn.*, 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

215. The difference between a disparate treatment pattern or practice situation and a disparate impact case is not important here, for in either case there is a statutory violation, and an employer can rely on data showing either a disparate impact from a practice or an overall underrepresentation in a job category.

216. *Johnson*, 107 S. Ct. at 1452 n.10.

sured by the pool of those specially qualified,²¹⁷ as in the O'Connor formulation.

The only significant difference could be the insistence by both Justices O'Connor and Powell in *Wygant* (as well as Justice White and the Justices concurring with Powell in *Wygant*) that there be strong evidence or a firm basis for a finding of prior discrimination "by the governmental unit involved"²¹⁸ — the employer's "own discriminatory conduct," as Justice Brennan put it. That could be a very real difference, but neither *Weber* nor *Johnson* would seem to meet this standard: in *Weber* there was an undisputed finding of no discrimination by Kaiser, and in *Johnson*, there was a similar finding with only some mild dispute.²¹⁹ Yet in both cases Justice O'Connor found a prima facie case satisfying her test because in both there was a significant statistical disparity in a traditionally segregated job category. If her test is satisfied in these two cases, despite findings to the contrary, will it not always be where the majority's test of "manifest imbalance" in "traditionally segregated job classifications" is met? Indeed, since her test does not require "traditional" segregation, but only a statistical disparity, it may reach even further than the majority's.

It should therefore not be too difficult to respond to an affirmative action challenge with a good factual showing of a disparate impact from a particular practice or a large disparity between the work force composition and the qualified applicant pool.²²⁰ Serious problems are likely to arise only when there is confusion as to what must be proven. In *Wygant*, for example, there was enough evidence of prior discrimination by the Jackson School Board to meet the "strong evidence" or "firm basis" test, because the statistical disparity and other evidence were sufficient to warrant a preliminary judgment by the State Civil Rights Commission that the Board had engaged in discriminatory practices.²²¹ But as Justice O'Connor explained, the majority had problems with accepting this as an adequate predicate because on

217. In support of the distinction, Justice Brennan also noted that Justice Blackmun's *Weber* concurrence recognized that the Court was not insisting on an "arguable violation," but was accepting something less. 107 S. Ct. at 1451. Blackmun observed, however, that even an "arguable violation" would probably focus on the "arguable," and not on the violation, and would not be hard to prove by a "mere disparity." *Weber*, 443 U.S. at 213-14.

218. *Wygant*, 106 S. Ct. at 1847.

219. See Appendix to Petition for Certiorari at 13a, *Johnson* (No. 85-1129).

220. The usual concern about such an admission — liability to minorities hurt by such a practice — may be small, given the passage of time and statute of limitations problems, as well as the limited nature of what must be shown. This is different, of course, from an admission when minority workers or the authorities directly challenge the practice itself, where the risk of liability is substantial.

221. See text at notes 17-19 *supra*; *Wygant*, 106 S. Ct. at 1854 (O'Connor, J., concurring).

summary judgment motions the lower courts "did not focus on the School Board's unquestionably compelling interest in remedying its apparent prior discrimination," but only on whether there had to be a formal "finding of past discrimination before or at the time of the institution of the plan."²²² To avoid this latter issue, the lower courts ignored this "unquestionably compelling interest" and relied on the societal discrimination and role model theory. It was thus the procedural posture and the inadequate record that defeated the Jackson School Board on the discrimination issue, though it might have lost on the layoffs anyway, as Justice Powell noted.²²³

Justice O'Connor's approach tries to have it both ways.²²⁴ On the one hand, it insists on some form of individual fault as a predicate for even voluntary affirmative action. On the other hand, it proposes a *prima facie* case test which is satisfied by a statistical disparity that not only produces the same result as an explicit societal discrimination standard, but was originally adopted in *Griggs v. Duke Power Co.*²²⁵ and elsewhere partly because of the existence of societal discrimina-

222. *Wygant*, 106 S. Ct. at 1854.

223. *Wygant*, 106 S. Ct. at 1849.

In *Johnson* the government sought to impose the burden of persuasion on the defendant employer to justify use of an affirmative action plan even when there is "apparent discrimination." Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Johnson*. Justice Powell's and Justice O'Connor's opinions in *Wygant* seem to indicate that the burden stays on the challenger. As Justice O'Connor put it:

[W]hen the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently "narrowly tailored." Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified.

106 S. Ct. at 1856.

224. Justice Scalia criticized Justice O'Connor's approach as a mere "half-way house" between the majority's "leaving employers scot-free to discriminate" and truly barring discrimination. *Johnson*, 107 S. Ct. at 1470 n.4. A statistical disparity, no matter how great, cannot establish a "firm basis" for belief in the mind of the employer, argued Scalia, because the employer may know a nondiscriminatory reason for the disparity. 107 S. Ct. at 1470 n.4. If the Scalia analysis is sound, O'Connor's approach would also preclude an affirmative action consent decree in which an employer disclaimed discrimination.

Justice Scalia's critique may, however, misconstrue the O'Connor standard. It calls not for a bona fide or other form of subjective belief, but only for a "firm basis for believing," which literally refers solely to the objective facts, not the subjective belief. Compare the Court's similar approach in criminal cases, such as *United States v. Leon*, 468 U.S. 897 (1984), and *United States v. Scott*, 437 U.S. 82 (1978). The latter construction brings the O'Connor standard even closer to the *Johnson*-majority approach.

Justice Scalia's other criticism of the O'Connor standard is that the Santa Clara plan was not designed to remedy discrimination, but Justice O'Connor's opinion cites evidence to the contrary. 107 S. Ct. at 1465.

225. 401 U.S. 424 (1971).

tion. Intent and its corollary, moral fault, are dispensed with in statutory cases on the theory that a neutral or even well-intentioned practice should not be allowed to build upon this nation's historical societal discrimination to produce discriminatory effects. Under a disparate impact definition of discrimination, an individual can be charged under Title VII without any moral fault on his part, even if the employer has "good intent."²²⁶ Although the discrimination is attributed to the actor, it is hardly the kind of fault to justify the serious sanctions that can follow a finding of violation.

3. Of "Egregiousness" and "Recalcitrance"

In an effort to convert a stinging rebuff²²⁷ into at least a partial victory, Assistant Attorney General Reynolds tried to paint the Court's 1986 rulings as "hardly ever" allowing racially preferential remedies. According to him, the Court's reference to the "use of [such] . . . remedies to correcting 'flagrant and egregious' acts of 'pervasive' discrimination," means that such remedies are probably reserved henceforth for instances of "intentional discrimination (not discriminatory effects)."²²⁸ And he construed *Sheet Metal Workers* as making "[s]uch preferences . . . available, according to a majority of the Court, as a last resort . . . only when it is essential to compel compliance by recalcitrant companies or unions"²²⁹

Some of the Justices' language backs up at least part of this claim. In *Sheet Metal Workers*, Justice Brennan did say that in most cases the court "need only order the employer or union to cease engaging in discriminatory practices and award make-whole relief to individuals victimized by those practices";²³⁰ Justice Powell referred to "particularly egregious conduct";²³¹ Justice O'Connor insisted that "creation of racial preferences by courts . . . must be done sparingly";²³² and Justice White referred to *Sheet Metal Workers* as "one of those un-

226. *Griggs*, 401 U.S. at 432; see also Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 70 (1972) (the defense of job-relatedness has no necessary connection with intent).

227. See *Firefighters v. Cleveland*, 106 S. Ct. at 3071 n.6, 3073 n.9; *Sheet Metal Workers*, 106 S. Ct. at 3034 n.24.

228. Reynolds A.B.A. Speech, *supra* note 110, at 5 (emphasis in original). His spokesman Mark Disler described the Court as ruling that "race-and-gender-preferential employment policies are hardly ever permissible even as remedies for the most egregious discrimination." N.Y. Times, Aug. 2, 1986, at 22, col. 3 (Letter to the Editor from Mark R. Disler, Deputy Attorney General).

229. Reynolds A.B.A. Speech, *supra* note 110, at 5 (emphasis in original).

230. 106 S. Ct. at 3050; see also 106 S. Ct. at 3050 n.48 (commending the Courts of Appeals for their "cautious approach").

231. 106 S. Ct. at 3054 (Powell, J., concurring).

232. 106 S. Ct. at 3061 (O'Connor, J., concurring).

usual cases where nonvictims of discrimination were entitled to a measure of . . . [affirmative action] relief.”²³³

But that is all. By contrast, as discussed above, the Court made it clear as early as *Bakke* that “constitutional or statutory violations” would justify such remedies,²³⁴ and a statutory violation obviously need not be predicated on intentional discrimination.

In any event, Reynolds’s suggestion could hardly apply to voluntary plans, even under *Wygant*’s insistence on a firm basis. A “recalcitrant” employer is hardly likely to adopt a voluntary plan. Even with respect to mandatory plans, “recalcitrance” may have more flexibility than is indicated by the kind of defiance that Local 28 displayed. Several of the lower court decisions cited by Justices Powell and Brennan based findings of “recalcitrance” solely on the defendant’s failure to *voluntarily* remedy the discrimination and resulting employment imbalance,²³⁵ a far cry from Local 28’s behavior and something that is probably not unusual. Relying on this kind of employer failure is also consistent with Justice Brennan’s observation that affirmative action may be necessary in order to remedy any “lingering effects” of discrimination.²³⁶

Mr. Reynolds’s other limiting interpretation of the discrimination predicate, that the discrimination must be “egregious” or “flagrant,” also seems unjustified. For one thing, these are extremely subjective concepts with which to determine liability. Even with so persistent an offender as Local 28, Justices White and O’Connor, for example, did not think its failure to meet the district court’s mandate warranted the contempt order that produced a race-preferential remedy,²³⁷ though five other Justices did.

Mr. Reynolds’s approach would also discourage virtually all voluntary plans (which may not have been unintended), for what employer will be willing to defend a suit challenging a voluntary preference with an admission of not just the statistical disparity necessary for a *prima facie* case, but with additional evidence showing an “egregious” or “flagrant” violation? That would certainly invite discrimination suits by minorities or women.

Finally, Mr. Reynolds’s concentration on the references to “egre-

233. 106 S. Ct. at 3062 (White, J., dissenting) (emphasis added).

234. *Bakke*, 438 U.S. at 302-03 (emphasis added).

235. See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Commn.*, 482 F.2d 1333, (2d Cir. 1972), *cert. denied*, 421 U.S. 991 (1975).

236. *Sheet Metal Workers*, 106 S. Ct. at 3050.

237. 106 S. Ct. at 3061-63 (O’Connor & White, JJ., dissenting).

gious" discrimination also overlooks Justice Brennan's two other justifications for race-conscious remedies: when there is either "particularly long-standing . . . discrimination," or when "necessary to dissipate the lingering effects of pervasive discrimination,"²³⁸ even if the discrimination has ended. Both are common phenomena and can be judged by objective standards, without any necessary connection with "egregiousness" or other culpable aspects of the discrimination.

C. *Narrow Tailoring*

The differences between the constitutional and statutory standards are even more marginal when one examines the second half of the constitutional equation and its statutory analogue: the constitutionally required narrow tailoring of the plan, and the Title VII implementing conditions set down in *Weber* and followed in *Sheet Metal Workers* and *Johnson*.

The constitutional factors were first set out by Justice Powell in *Fullilove* and *Sheet Metal Workers* as follows:

(i) [T]he efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; and (iv) the availability of waiver provisions if the hiring plan could not be met. . . . A final factor of primary importance . . . [is] the effect of the [remedy] upon innocent third parties.²³⁹

Similarly, the statutory test also requires "cautious" tailoring.²⁴⁰ In evaluating the plan the court must balance a variety of factors, including the necessity of the plan;²⁴¹ whether it is temporary, flexible, and proportional to the qualified labor pool;²⁴² and whether it "unnecessarily trammel[s] the interests of white [or male] employees" by creating "an absolute bar to [their] advancement."²⁴³

238. 106 S. Ct. at 3036, 3050 (emphasis added).

239. 106 S. Ct. at 3055 (Powell, J., concurring) (citation omitted). Justice Stevens rejects these requirements on the ground that once a violation is found, the ordinary constitutional limitations do not apply. *National Socy. of Professional Engrs. v. United States*, 435 U.S. 679, 697-98 (1978). See also *International Salt Co. v. United States*, 332 U.S. 392, 400-01 (1947); *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066, 1077 n.22 (1986) ("The judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large."). *Paradise*, 107 S. Ct. at 1078 n.3. See also *Johnson*, 107 S. Ct. at 1443 n.3. There is a good deal of authority for this proposition, which seems reasonable. On the other hand, if a remedy may infringe on constitutional rights, additional restrictions seem appropriate, because of the importance of what is being infringed, especially if the rights affected are those of innocent people.

240. *Sheet Metal Workers*, 106 S. Ct. at 3050 & n.48.

241. 106 S. Ct. at 3050.

242. See *Johnson*, 107 S. Ct. at 1461.

243. *Weber*, 443 U.S. at 208.

Both verbally and in practice, the statutory and constitutional criteria amount to the same thing, as the treatment of the district court's order in *Sheet Metal Workers* indicates: the analyses under the two sets of standards were identical.²⁴⁴

The more important question is, of course, how stringently these standards will be applied. The 1986 and 1987 cases dealt with all five requirements enumerated in *Sheet Metal Workers*, and despite dissents with respect to the Court's application of each of the factors at one time or another, they indicate that few affirmative action plans are likely to fail these criteria.

1. *Alternatives*

Assistant Attorney General Reynolds also has argued that court-ordered racial preference plans are a "last resort" remedy to be used only "all else failing."²⁴⁵ He seems to have picked up some support from Justices O'Connor, Scalia, White, and the Chief Justice, who argued in *Paradise* that the one-for-one promotion plan was unnecessary given the availability of other alternatives.²⁴⁶ But in apparent response to the majority's point that no alternatives were suggested or would have been as effective,²⁴⁷ the dissent urged that the district court should have at least "considered the efficacy of alternative remedies."²⁴⁸ Thus, a district court — and perhaps one who voluntarily adopts a plan or those agreeing to a consent decree — may need only to indicate that there was such consideration to satisfy even the dissenters.

The majority, however, does not demand even that much. In *Paradise*, as he had in *Sheet Metal Workers* with respect to Title VII, Justice Brennan stressed the broad discretion vested in the district courts to remedy racial discrimination. "Congress deliberately gave the district courts broad authority under Title VII to fashion the most complete relief possible to eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history,' "²⁴⁹ said Justice Bren-

244. Compare *Sheet Metal Workers*, 106 S. Ct. at 3050-52 (statutory), with 106 S. Ct. at 3053 (constitutional). See also *Paradise*, 107 S. Ct. at 1067 (constitutional).

245. Reynolds A.B.A. Speech, *supra* note 110, at 4.

246. *Paradise*, 107 S. Ct. at 1080.

247. 107 S. Ct. at 1068-69, 1070 n.28.

248. 107 S. Ct. at 1082 (quoting *Sheet Metal Workers*, 106 S. Ct. at 3053); see also *Hammon v. Barry*, 813 F.2d 412, 429-30 (D.C. Cir.), *affd. on rehearing*, 826 F.2d 73, 81 (D.C. Cir. 1987) (alternatives not considered).

249. *Sheet Metal Workers*, 106 S. Ct. at 3044 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

nan. As noted above, Justice Stevens went even further, making a majority of five for allowing such broad discretion.

This seems consistent at least with Title VII. The 1972 Amendments to section 706(g) broadened the district court's remedial powers to include "any other equitable relief as the court deems appropriate"²⁵⁰ in order "to give the courts wide discretion . . . to fashion the most complete relief possible."²⁵¹ Justice Powell made a similar point about constitutional cases in *Fullilove*, where his discussions of prior school and employment discrimination cases stressed that even though any affirmative remedy . . . is likely to affect persons differently depending upon their race . . . this Court has not required remedial plans to be limited to the least restrictive means of implementation. We have recognized that the choice of remedies to redress racial discrimination is "a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court."²⁵²

The approach taken by the Court in both these recent and earlier opinions makes Mr. Reynolds's prediction that the "lower Federal courts will no longer reach so quickly and indiscriminately for 'goals and timetables' that prefer by race"²⁵³ an especially fanciful piece of wishful thinking. For if one thing is clear from these decisions, it is that a majority of the Justices think the courts of appeals have been on the right track. Justice Brennan not only cited lower court cases continually in *Sheet Metal Workers*,²⁵⁴ but explicitly commended their "cautious approach,"²⁵⁵ citing a study coauthored by now-Judge Harry Edwards.²⁵⁶ For his part, Justice Powell seems to have gone out of his way to approve lower court practice. Indeed, in both *Sheet Metal Workers* and *Fullilove*, he said that he had drawn four of his five criteria for a narrowly tailored plan from courts of appeals decisions.²⁵⁷ And in *Bakke*, he chose not to cast doubt on the many race-conscious plans approved by the courts of appeals, but to reconcile his

250. 42 U.S.C. § 2000e-5(g) (1982).

251. 118 CONG. REC. 7168 (1972) (section-by-section analysis of H.R. 1746 submitted by Senators Williams and Javits).

252. 448 U.S. at 508 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 794 (1976)) (Powell, J., concurring in part and dissenting in part); see also Greenawalt, *supra* note 131, at 114 ("Nor do the courts necessarily reject the use of racial criteria simply because alternatives might conceivably suffice."). But see *Fullilove* where Justice Powell also stressed the need for sensitivity to "less intrusive means." 448 U.S. at 510.

253. Reynolds A.B.A. Speech, *supra* note 110, at 8.

254. See, e.g., 106 S. Ct. at 3036, 3037 n.28, 3050 n.47.

255. 106 S. Ct. at 3050 n.48.

256. 106 S. Ct. at 3050 n.48 (citing Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975)).

257. *Sheet Metal Workers*, 106 S. Ct. at 3055 (relying on *Fullilove v. Klutznick*, 448 U.S. 448, 510-11 (1980)) (Powell, J. concurring).

views with theirs.²⁵⁸ The lower courts have been approving race-preferential programs for some twenty years, and businesses, unions and public agencies have been working with such programs without serious complaint.²⁵⁹ It would be a radical step indeed to place in jeopardy thousands upon thousands of affirmative action plans covering millions of workers, a step that a pragmatic conservative like Justice Powell was obviously reluctant to take.²⁶⁰

Moreover, in many instances, there really are not that many alternatives to affirmative action.²⁶¹ Most of the proposals by opponents of affirmative action are ineffectual. One list, for example, includes the following:

(a) massive government manpower training programs; (b) intensified efforts to open unions and union training programs; (c) career ladders for training in skills and technical occupations; (d) vigorous enforcement of antidiscrimination laws; (e) the use of examination and other selection processes which are free of cultural bias, and which are job-related and of predictive validity; (f) intensive recruitment of qualified members of minority groups; and (g) the use of sensitivity and attitudinal tests and criteria for those jobs dealing largely with minority groups.²⁶²

Unfortunately, almost all of these will often be inadequate, especially in view of this Administration's sharp cuts in funding these programs. Either they are very expensive, such as manpower training, or very long-term, such as career ladders or sensitivity training, or both. Also, a program like "intensive recruitment of qualified members of minority groups" itself reflects race-consciousness, for money dedicated to this purpose diverts resources from everyone else on a color-conscious basis.²⁶³

258. 438 U.S. at 301-02 & n.40. Compare the Court's approach in *Washington v. Davis*, 426 U.S. 229, 244-45 & n.12 (1976), where numerous lower court decisions were disapproved.

259. See note 11 *supra*. For businesses' acceptance and, indeed, approval of affirmative action, see *Wash. Post*, July 3, 1986, at 1, col. 6 (approval of Court's 1986 affirmative action decisions); Neely, *Government Role in Rooting Out, Remedying Discrimination Is Shifting*, 16 NATL. J. 1772, 1774 (1984). Small employers are less happy. See *N.Y. Times*, Mar. 3, 1986, at B4, col. 3.

260. For a survey of Justice Powell's work on the Court, see H. SCHWARTZ, *PACKING THE COURTS* ch. 8 (forthcoming 1988); Schwartz, *A Pragmatic Independent*, A.B.A. J., June 15, 1986, at 42 (special issue).

261. As examples of situations where affirmative action is necessary, Justice Brennan listed "recalcitrant employers," where "informal mechanisms . . . obstruct employment opportunities," and where an employer's reputation discourages applicants. He also noted that affirmative action programs may be necessary as interim goals "pending the development of nondiscriminatory hiring or promotion procedures." *Sheet Metal Workers*, 106 S. Ct. at 3036-37.

262. Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POLY. 627, 685-86 (1985).

263. See *Weber*, 443 U.S. at 209-16 (Blackmun, J., concurring). A personnel manager commented on these proposals as follows:

You talk about programs and retraining . . . which are fine, because these are many of the

Indeed, although Mr. Reynolds and the Administration refuse to admit this, it is now indisputable that affirmative action, while no panacea, has improved things significantly. At hearings before the House Civil Rights Subcommittee in 1985, not only did individual businesses provide qualitative judgments, but several studies were reported which showed that

affirmative action does work, particularly for blacks. . . . Black employment has increased from 4 to 10 percent in contractor establishments that are covered by affirmative action relative to noncontractor establishments. That has been pretty much across the board in terms of occupations. It's not true that it's only helping the highly skilled or the unskilled or that it's leading to a split in the minority community.²⁶⁴

same things we are talking about in the black community, but they are dependent . . . on altruism and I don't believe in it. . . . You talk about going to the private sector and private industries to do retraining, these are programs that take a tremendous economic investment on the part of employers. . . . The trickle-down theory from what we have seen . . . [is] the very terror that Mr. [Bayard] Rustin talked about in the black communities, because for us it hasn't trickled down or if it does trickle down, we're talking about a long-term program. How long is long-term? What do you do in the short-term?

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AFFIRMATIVE ACTION CONFERENCE: TOWARD A COLOR-BLIND SOCIETY 22 (Apr. 8, 1986) (statement of Delia Council, Manpower Development Research Corp.).

264. *Hearings*, *supra* note 11, at 107 (testimony of Professor Jonathan Leonard). The following is a summary of the findings:

- (1) Black employment share increased relatively more in contractor establishments under the affirmative action obligation than in non-contractor establishments between 1974 and 1980. This holds true in a number of specifications, and it holds true controlling for establishment size, growth industry, region, occupational structure, corporate structure, and past employment share. This appears to reflect changed establishment behavior, rather than the selection into contractor status of establishments with high or growing black male employment share. In other words affirmative action appears to have been successful in increasing blacks' share of employment.
- (2) This positive employment impact has been relatively greater in the more highly skilled occupations and has resulted in net occupational upgrading for minority males. It is worth noting that increases in black employment under affirmative action are not limited to low-skill jobs, nor to high-skilled jobs. It appears that affirmative action has promoted black employment across the occupational spectrum.
- (3) Compliance reviews have been an effective tool in promoting the employment of blacks. Black employment share has increased faster at establishments that have undergone a compliance review.
- (4) The impact of affirmative action on non-black minorities and on white females has been mixed. In particular, while white females gain under affirmative action in establishments where their initial share of employment is small, there is some evidence that their employment growth is slower under affirmative action where their initial shares are great and where there have been compliance reviews. To speculate on some possible explanations for this divergent effect across protected groups, there has been a large and continuing increase in the labor supply of women that may be swamping the relatively smaller demand side effects of affirmative action. Among non-black minorities, affirmative action appears to have been more effective in larger establishments.
- (5) The employment gains engendered by affirmative action do not seem to be transient. Females and black males at a sample of reviewed establishments had a lower share of terminations relative to hires than other workers.
- (6) Economic growth is among the best policies for bringing minorities and females into the workforce. Minority and female employment shares increase fastest at growing establishments which can more easily accommodate the pressures of affirmative action.

Id. at 109; *see also* Wash. Post, June 20, 1983, at A3, col. 1; N.Y. Times, Nov. 8, 1985, at A34,

Other studies confirm this.²⁶⁵ In sum, few other remedies work as well or as quickly. As the New York City Corporation Counsel told the Supreme Court about the construction industry in the *Fullilove* case, "[l]ess drastic means of attempting to eradicate and remedy discrimination have been attempted repeatedly and continuously over the past decade and a half. They have all failed."²⁶⁶ Where affirmative action is ended, progress often stops.²⁶⁷

These considerations apply to voluntary plans as much as to court-ordered ones. As Justice Stevens remarked in *Johnson*, there must be "breathing room" for voluntary initiatives.²⁶⁸ The problems of attaining a work-force untainted by discrimination are very difficult, for economic, demographic, personnel, and political reasons. A fair amount of trial and error must be permitted. Any insistence on extensive exploration of possible alternatives could prove fatal to these initiatives. Second-guessing and hindsight are always easy, and the time taken to try out the alternatives may simply defer remedial action, at a time when minority employment and university admissions are already in bad shape.

col. 3 (Letter to the Editor by Herbert Hammerman); Pear, *Affirmative Action Effort on Amtrak Corridor Praised as Effective*, N.Y. Times, Apr. 22, 1986, at A12, col. 1.

265. *Hearings*, *supra* note 11, at 120-27, 151 (early studies); Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-[J]KENT L. REV. 1, 4, 7 (1987).

266. Brief for Respondents (City of New York) at 33, *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (No. 78-1007), *quoted in* Schwartz, *supra* note 134, at 62.

267. See Trost, *Minority Firms Get Smaller Share of U.S. Contracts Under Reagan*, Wall St. J., Apr. 10, 1984, at 31, col. 4 (decline in minority government contracts upon termination of set-asides); N.Y. Times, Jan. 24, 1984, at A24, col. 3 ("Most discriminatory habits in academia are nonactionable; affirmative action goals are our only instrument for focusing sustained attention.") (Letter to the Editor by Mary Bateson).

An example from Alabama (one aspect of which relating to promotions was before the Court in *Paradise*) illustrates the value of affirmative action. Alabama had always excluded blacks from any but the most menial state jobs. In the late 1960s, a federal court found that only 27 of 3000 clerical and managerial employees were black. Judge Frank Johnson ordered extensive recruiting of blacks, as well as the hiring of the few specific identified individual blacks who could prove they were the victims of discrimination (the remedies currently urged by the Justice Department). *United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

Nothing happened. Another suit was filed, this time just against the state police, and a 50% hiring goal was imposed, until blacks reached 25% of the force. *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), *aff'd*, 493 F.2d 614 (5th Cir. 1974). Today, Alabama has the most thoroughly integrated state police force in the country, with 20-25% of the force at the trooper level black. The decree in *Frazer* was modified by Judge Johnson to include hiring goals. 340 F. Supp. at 706. In a later phase of the case, Judge Johnson said, "this Court's experience reflects that the decrees . . . must contain hiring goals; otherwise effective relief will not be achieved." *United States v. Dothard*, 373 F. Supp. 504, 507 (M.D. Ala.), *aff'd. sub nom.* *NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974). See *Paradise*, 107 S. Ct. at 1058 n.2, 1059 n.4. Other Alabama agencies have also achieved substantial improvements. Huron, *But Government Can Help*, Wash. Post, Aug. 12, 1984, at B1, col. 1.

268. *Johnson*, 107 S. Ct. at 1459.

2. Harm to White or Male Workers

The other major factor is the harm that race- or gender-conscious affirmative action imposes on white or male workers. Here too, matters seem largely settled. Despite the Court's generally favorable treatment of affirmative action, a majority of the Justices are unwilling to countenance layoffs that adversely affect identified nonminority individuals.²⁶⁹

Few problems are more troubling. On the one hand, "[l]ayoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities."²⁷⁰ On the other hand, certain perhaps innocent individuals will suffer if their seniority is overridden. Either way somebody is hurt, and there is no objective instrument by which to calibrate which group will suffer the most from such layoffs, and no criteria by which to judge whose suffering is more unfair or more painful. In human terms, it is simply not true that there is no difference between hiring preferences and layoff preferences.²⁷¹

But the problem doesn't affect only race-preferential layoff programs. Even when relief is limited to identified victims, some whites will lose competitive seniority and will be more vulnerable to layoff. This can be a rather large number, if many minorities can show either that they were turned away or were deterred from even applying.²⁷²

Also, the expectations raised by seniority are not vested, but are

269. Justice O'Connor did hold open the possibility that in some circumstances she might accept even layoffs, if they were related to a valid hiring goal, *Wygant*, 106 S. Ct. at 1857, but she gave no details. Given the combination of *Stotts*, where she joined the majority, and her vote in *Wygant*, it is unlikely she will vote for a race-preferential layoff provision that overrides seniority.

270. UNITED STATES COMMISSION ON CIVIL RIGHTS, *LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS* 36 (1977). For example, the Commission found that fiscal cutbacks caused by the 1974-1975 recession had:

a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into place as a permanent, expendable economic and social underclass.

Id. at 60-61. In New York City, "layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975." *Id.* at 25-26 (footnotes omitted).

271. *Contra Wygant*, 106 S. Ct. at 1870 n.14 (Stevens, J., dissenting); cf. Sullivan, *supra* note 200, at 95.

272. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In some cases, the number of hires from among those actually discriminated against is as great as those who would be hired under a goals and timetables approach. Conversation with Barry Goldstein, Assistant Counsel, NAACP Legal Defense & Education Fund, Inc.

frequently overridden and always susceptible to modification either because of an overriding public policy like a veterans preference,²⁷³ or by special preferences for union officials.²⁷⁴ Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is computed, and more,²⁷⁵ that modifying a particular system to prevent reversal of some modest gains for a congressional policy of the "highest priority," such as eliminating the effects of racial discrimination, seems well within a court's equity discretion.

This is not to say alternatives should not be tried. Work-sharing, reduced work-weeks, elimination of overtime, and rotational layoffs are just some of the possibilities.²⁷⁶ But if none of these work, the hard problem must be faced, and if affirmative action hiring is legitimate, then preservation of the modest gains it has achieved seems the higher priority.

Unlike layoffs, the Court seems to accept preferences for promotions, both voluntary as in *Johnson*, and mandatory as in *Paradise*. Both cases are, however, rather special — *Johnson* involves a single promotion, rather than the application of an over-all quota or goal,²⁷⁷ and *Paradise* involved an interim plan that was applied only once. The Court's conclusion that a promotion for a woman or minority does not constitute an absolute bar to the disadvantaged male or white — Johnson himself got a Road Dispatcher position a few years later — indicates it may not treat promotions too differently from hiring.

3. Flexibility, Proportionality, and Duration

Although there were splits on each of the other three factors in these cases, the law seems quite clear and quite reasonable. The Court insisted that any goals be applied flexibly, meaning that economic, demographic, and other problems in achieving those goals may and

273. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 778 (1976); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336 (1953); *Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1605-06 (1969).

274. *Aeronautical Indus. Dist. Lodge v. Campbell*, 337 U.S. 521, 526-27 (1949).

275. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 66 (1982) (promotions based on seniority plus certain qualifications); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 606-08 (1980).

276. See Note, *Last Hired, First Fired: Seniority, Layoffs and Title VII: Questions of Liability and Remedy*, 11 COLUM. J.L. & SOC. PROBS. 343, 398-400 (1975).

277. The Court pointed this out, but its significance in that context is unclear. *Johnson*, 107 S. Ct. at 1447.

should be taken into account and the goals revised and postponed if necessary.²⁷⁸ The Court also interpreted the duration factor to mean not that the plan had to last only a brief period, but rather that it could be used only to "attain" a balanced work force, not to "maintain" it once the balance had been achieved.²⁷⁹ The proportionality factor was construed to mean that the ultimate goal had to be related to the qualified pool, though annual goals could exceed minority representation in that pool in order to accelerate the process. None of these standards is likely to create difficult problems in practice.

CONCLUSION

Creating a society free of the effects of centuries and, so far as women are concerned, millennia of discrimination is very difficult. Despite some progress, we are worse off in some areas such as minority employment than we were twenty years ago.²⁸⁰ Moreover, although many women have successfully moved into the work force, there are still many barriers to their advancement; there is even less upward mobility for minorities.

The 1986 and 1987 cases should eliminate at least one obstacle. Though problems remain, the effort to kill affirmative action programs has failed.

278. The disagreement in *Sheet Metal Workers* was over whether the district court had considered economic and demographic problems. The disagreement in *Johnson* was more puzzling: even though the county and the Court made it clear that the plan applied to rather broad job categories, and the goals were constantly being revised to take the actual qualified pool into account, Justice Scalia described the plan as applying to "jobs," and ignored the county's willingness to virtually abandon some goals. In any event, the breadth of the job category, which encompasses many jobs, makes it somewhat easier to eliminate the imbalance.

279. Cf. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976).

280. *Briefing: On Black Employment*, N.Y. Times, Dec. 25, 1987, at A22, col. 1.